The Sydney Morning Herald.

"IN MODERATION PLACING ALL MY GLORY, WHILE TORIES CALL ME WHIG—AND WHIGS A TORY."

TERMS OF SUBSCRIPTION. Sydney, Fifteen Shillings per Quarter. Single Numbers, Sixpence. Country, Seventeen Shillings and Sixpence per Quarter. Ten per cent. discount for payment in advance, and ten per cent. added if accounts are allowed to run over six months.

VOL. XIX. TUESDAY, APRIL 22 1845. No. 2477

CASH TERMS FOR ADVERTISEMENTS. For one inch and under, Three Shillings, and One Shilling for every additional inch, for each insertion.

The only persons authorised to receive Moneys and Communications on account of the "Sydney Morning Herald" (except at the Office of Publication, Lower George-street, Sydney) are Mr. Wm. Ball and Mr. Alfred Fairfax, Collectors, Sydney; Mr. Wm. Tress, Bathurst; Mr. Laban White, Windsor; Mr. Hugh Taylor, Parramatta; Mr. A. W. Larymore, Maitland and Wollombi; Mr. John Brown, Campbelltown; Mr. John Coleman, Penrith; Mr. Thomas W. Palmer, Deputy Postmaster, Wollongong; Mr. Robert Craig, Cabinetmaker, Goulburn; Mr. John M'Kinlay, Postmaster, Cassilis and Merton; Mr. Stephen Nutter, Queanbeyan; Mr. Thomas Hope, Deputy Postmaster, Singleton and Jerry's Plains; Mr. William Pritchard, Deputy Postmaster, Liverpool; Mr. Michael Doyle, Berrima; Mr. Robert Davison, for the District of Yass; Mr. Thomas Dowse, Moreton Bay; Mr. John Houlding, Postmaster, Raymond Terrace; Mr. Pierce Hegarty, Musclebrook; Mr. Horatio Tozer, Port Macquarie; Mr. Henry Alderson, Clarence River; Port Phillip; Captain Thom, Launceston and Van Diemen's Land; Mr. William Barnerd Rhodes, Wellington, for Port Nicholson and Cook's Straits, New Zealand who are provided with Printed Receipts, with the written signatures of "Kemp and Fairfax," who hereby give Notice that no other will be acknowledged for debts accruing from January 1841.

The "Sydney Morning Herald" is Published every Morning (Sundays excepted); and the Quarters end the 31st March, 30th June, 30th September, and 31st December; at which periods only can Subscribers decline by giving Notice and paying the amount due to the end of the Current Quarter. Advertisements must specify on the face of them the number of times they are intended to be inserted, or they will be continued till countermanded, and charged to the party. No Advertisements can be withdrawn after Eleven o'clock, a. m., but new ones will be received until Nine o'clock in the Evening. No verbal communications can be attended to, and all letters must be post-paid or they will not be taken in

SPECIAL NOTICE.

THE Subscribers to this Paper, and the Public generally, are respectfully informed, that the following Rules are strictly adhered to;—

In Sydney.- No new Subscribers will be received without *one quarter* being paid in advance, for which ten per cent. will be allowed; the subscription in advance being 13s.6d, per quarter.

In the Country.—No new Subscribers will be received without *half-a-year* being paid in advance, for which ten per cent. will be allowed; the subscription in advance being £1 11s. 6d. per half-year; and the Proprietors must be furnished at the time with a written undertaking that all future payments, both for subscription and charges of advertisements, shall be made in Sydney, or by the hands of an Agent.

In all cases, whether in Town or Country, the names of persons will be struck off the subscription list, when the arrears against them have stood over twelve months, and proceedings for recovering the amount due will be instituted.

Advertisements must be paid for previous to their insertion.

In all cases of Insolvency, when the party is a Subscriber to this Journal, the name is at once erased from the Subscriber's Book; and if he wish to take the paper in future he must comply with the rule affecting new Subscribers, and pay in advance.

PARRAMATTA STEAMERS.

CHANGE OF WHARF.

THE Public is respectfully informed that the above Packets have *ceased to ply* FROM THE COMMERCIAL WHARF, but will in future run from KELLICK'S WHARF, (adjoining the Hunter's River Steam Company). All applications to be made there, or to J. and W. Byrnes, Parramatta, where wool and other stores will be warehoused as on former occasions.

Parramatta, March 22. 4487

PARRAMATTA STEAMERS.

ALTERATION OF HOURS AND PRICES.

THE Public is respectfully informed that, on and after Monday, the 7th April, (and during the winter months), the above first class Packets will make their trips between Parramatta and Sydney as follows:—

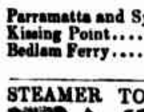
From Parramatta.	From Sydney.
At 8 o'clock, A. M.	At 9 o'clock, A. M.
11 " "	11 " "
1 " P. M.	1 " P. M.
and 4 " "	and 4 " "

FARES.

	Cabin. s. d.	Steerage. s. d.
Parramatta and Sydney ..	1 6	1 0
Kissing Point...........	1 0	0 9
Bedlam Ferry...........	0 9	0 6

4891

STEAMER TO CLARENCE RIVER.



THE *WILLIAM IV.* Steam-packet will leave for the above district on WEDNESDAY next, the 23rd instant, at 7 P. M.

Kellick's Wharf, April 19. 5975

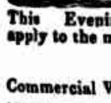
FOR WOLLONGONG,

THE PACKET *GEORGIANA* will leave the Commercial Wharf, at five o'clock, This Evening. For freight or passage apply to the master, on board; or to

JOHN MEIKLEJOHN, Agent.

Commercial Wharf, April 22. 5902

FOR LIMA DIRECT.



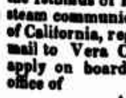
THE fine first class SHIP *ELIZABETH,* Captain James Moffatt, 900 tons register, will sail for the above port in ten days. Carries an experienced surgeon. This vessel affords an excellent opportunity for passengers wishing to proceed to Europe or America, by the route across the Isthmus of Panama, there being constant steam communication from Callao to the Gulf of California, regularly meeting the overland mail to Vera Cruz. For freight or passage apply on board, at Moore's Wharf, or at the office of

A. B. SMITH AND CO.

Sussex-street, April 18. 5886

FOR PASSENGERS ONLY.

TO CALCUTTA DIRECT,

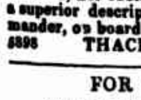


THE first-class noted fast-sailing barque *ROYAL CONSORT,* 600 tons, J Legge, Commander. This fine vessel being under charter to the Hon. the East India Company will meet with early dispatch; she presents a most eligible opportunity to passengers desirous of proceeding to India, her cabin accommodations being of a superior description. Apply to the Commander, on board; or to

5898 THACKER, MASON, AND CO.

FOR HONGKONG.

WITH IMMEDIATE DESPATCH.



THE clipper Schooner *MAID OF ATHENS.* For freight or passage apply to

WM. FANNING, Spring-street.

Sydney, April 7. 5243

FOR LONDON DIRECT.

THE first-class barque *SARAH SCOTT,* Captain A. Butcher, will be despatched on or before the 6th proximo; is still open for 150 bales wool on freight. Apply to

SMITH AND CAMPBELL.

Has good accommodation for steerage passengers. 5961

FOR LONDON.

For Light Freight and Passengers only.

THE British built BARQUE *MARY,* Captain Newby; has excellent accommodations for Cabin and STEERAGE Passengers. Apply to

A. FOTHERINGHAM, or to J. B. METCALFE.

April 17. 5803

TO STEERAGE AND CABIN PASSENGERS.

FOR LONDON DIRECT.

THE First-class Barque *ANN GRANT,* 377 tons, D. Foreman, Commander. The above vessel will sail early in May, and has now room for a limited quantity of light freight only. She will take a few steerage passengers, and has one side cabin still disengaged. Apply on board, at Miller's Point, late Moore's Wharf; or, to

5897 THACKER, MASON, AND CO.

FOR FREIGHT OR CHARTER.

THE fast-sailing clipper-built schooner *CASTLEREAGH,* 91 tons, John Clark, Commander The above vessel is now discharging her cargo from the Cape, and will be ready for sea in a few days. A charter to New Zealand, Adelaide, or the adjacent colonies would be preferred. Apply on board, or to

6052 THACKER, MASON, AND CO.

NOTICE.

SHIPPERS OF HORSES, per *HYDRABAD,* are requested to embark them, from the Circular Quay, on the 23rd, 24th, and 25th instant.

Passengers are requested to be on board on the evening of the 27th. One cabin disengaged

All claims against the ship to be forwarded, in duplicate, on or before Saturday next.

SMITH AND CAMPBELL.

Campbell's Wharf, April 21. 6923

SYDNEY FIRE INSURANCE COMPANY,

—Office, No. 437, George-street, entrance in King-street.

CHAIRMAN—MR. T. W. SMART.
DEPUTY CHAIRMAN—MR. CHARLES KEMP.
COMMITTEE—MR. THOMAS AGARS.
MR. THOMAS HOLT, JUN.
MR. R. W. SCOTT.
SURVEYOR—MR. JAMES HUME.
SECRETARY—MR. GEORGE KING.

The half-yearly General Meeting of this Company will be held on Tuesday, May 6th, and will be afterwards made Special, for the purpose of considering the following alterations in the Deed of Settlement:—

1. To repeal or modify so much of section 22 as to admit of mortgagees holding the policies of mortgagors without affecting the limitation of liability, provided in section 5.

2. To repeal or modify so much of section 4, beginning at line 15, as instead of so long as the policy executed to him in respect of such insurance shall be current and in force, &c., to read so long as the policy or policies, or any future policy or policies, or the renewal or renewals thereof executed to him, shall be current and in force, &c.

3. To repeal or modify so much of section 12 as to give the directors power to accept or reject proposals for the renewal of policies.

By order of the Board

GEORGE KING, Secretary.

6036

SYDNEY CHORAL SOCIETY.

PATRON.
The Lord Bishop of Australia

COMMITTEE:

Rev. Dr. Cowper	Mr. Nathan, M.R.C.S.
Rev. R. Allwood	Mr. H. Tingcombe
Rev. R. K. Sconce	Mr W M Donell
Rev. J. C Grylls	Mr J. Deane
Rev. W. H. Walsh, Chairman	Mr. C. D. Logan
Mr. H. J. Hatch, Secretary	Mr J. Johnson, Conductor
Mr. J. R. Hurst, Treasurer	Mr. W. Johnson, Leader.

THE above Society has been formed by Members of the Church of England, in the hope that by encouraging a taste for choral singing generally, much improvement may be effected in the Chaunting and Psalmody of Divine Worship. In furtherance of so important an object, it is requested that all persons who are possessed of musical talent, and are desirous of rendering their assistance as singing members, will give in their names to one or other of the Committee on or before Wednesday next.

Churchmen generally, whether they join the Quires or not, may be admitted as members.

The meetings of the Society will be held, by permission of the Reverend the Incumbent, in the St. James's Infant School, Castlereagh-street, every Wednesday evening, at half-past seven o'clock.

The entrance fee is ten shillings; and the subscription one pound a year, or two shillings a month, to be paid in advance.

Further information may be obtained by application to the Secretary, at Napoleon Cottage, Sheriff's Gardens, from whom may be obtained the separate parts of the pieces ordered for practice on Wednesday evening next.

5997 H. J. HATCH, Secretary.

AUSTRALIAN AUCTION COMPANY.

TAKE NOTICE, that an Adjourned Special General Meeting of the Shareholders of the above Company will be held at their office, No. 397, Pitt-street, on Thursday, the 1st day of May next, at three o'clock precisely, in accordance with a resolution passed at the Special General Meeting of 11th December, 1844.

EDWARD KNOX, Manager.

April 16. 5885

NOTICE.

BRIG "TRYPHENA," CAPTAIN HINDMARSH, FOR LIVERPOOL.

ALL Persons having claims against the above-named vessel, are requested to present the same *(in duplicate)* at the counting-house of the undersigned, before three o'clock to-day, otherwise they will not be paid.

C. ABERCROMBIE.

Sydney, April 22. 6012

THE undersigned has this day relinquished business in Sydney; and as he must leave town this week, he hopes to receive immediate payment of his accounts.

JOHN STEWART, Veterinary Surgeon.

April 21. 6008

QUEEN'S BIRTHDAY REGATTA, 24TH OF MAY, 1845.

A MEETING will be held at Mr. Henderson's, Dove Inn, corner of Erskine and Kent streets, on THURSDAY EVENING NEXT, at eight o'clock, for the purpose of getting up a THIRD-CLASS SAILING MATCH and SKIFF RACE on the above day. All parties interested are particularly requested to attend 6047

HOMEBUSH RACES.

STEWARDS.
MR. W. RUSSELL,—MR. G. COOPER TURNER,—MR. R. FITZGERALD.
JUDGE.
MR. JOHN ROSE HOLDEN.
CLERK OF THE COURSE.
MR A. WAY.

FIRST DAY.

WEDNESDAY, 21ST MAY, 1845.

FIRST RACE.

The METROPOLITAN STAKES of Five Sovereigns each, with Fifty Sovereigns added, for all horses weight for age. Three miles; entrance Three Sovereigns; three entrances or no race.

SECOND RACE.

The TRIAL STAKES of Ten Sovereigns each, with Forty Sovereigns added, (Five Sovereigns forfeit if declared to the Honorary Secretary, at the Royal Hotel, on the 1st of May, between the hours of one and two P.M.), for two year olds, once round the course; colts 7st. 7 lbs; fillies 7 st. 4 lbs. Entrance Three Sovereigns.

THIRD RACE.

The ST. LEGER STAKES of Ten Sovereigns each, with Fifty Sovereigns added, (Five Sovereigns forfeit if declared to the Honorary Secretary, at the Royal Hotel, on the 1st of May, between the hours of one and two P.M.), for three year olds, one mile and a half; colts 8 st. 7lbs; fillies 8 st. 4 lbs. Entrance; Three Sovereigns.

FOURTH RACE.

The WELTER STAKES of Three Sovereigns each, with Fifteen Sovereigns added, for all horses, three year olds, carrying 10 st., four ditto 10 st. 12 lbs., five ditto 11 st. 7lbs., six and aged 12 st., heats twice round. Entrance; Two Sovereigns three entrances or no race.

SECOND DAY.

THURSDAY, MAY 22.

FIRST RACE.

The TRADESMEN'S CUP, value Sixty Sovereigns, with a Sweepstakes of Five Sovereigns each, for horses that never won more than £30 at any one time, weight for age, heats twice round. Entrance Three Sovereigns: three entrances or no race.

SECOND RACE.

A PURSE of Fifty Guineas, presented by the Officers of H. E. I. Company's Bungarrabee Depôt, for all horses bred in the colony of New South Wales and Van Dieman's Land, with a sweepstakes of five sovereigns each, two and a half miles, weight for age, as follows, 2 years old., a feather; 3 ditto, 7 st. 4 lbs; 4 ditto 8 st. 4 lbs.; 5 ditto 8 st. 12 lbs.; 6 and aged 9 st. 2 lbs; mares and geldings allowed 3 lbs., maidens allowed 7lbs

Remainder of the day reserved for hack races and matches.

THIRD DAY.

FRIDAY, MAY 23.

FIRST RACE.

The CHAMPION CUP, value One Hundred Sovereigns, with a Sweepstakes of Five Sovereigns each, for all horses, weight for age, twice round the course. Entrance Three Sovereigns, three entrances or no race.

SECOND RACE.

The HOMEBUSH STAKES of Five Sovereigns each with Forty Sovereigns added, for all Horses, weight for age; heats once round. Entrance Three Sovereigns; three entrances or no race.

THIRD RACE.

The LADIES' PURSE of Thirty Sovereigns, with a Sweepstakes of Five Sovereigns each, for all horses, weight for age; once round and a distance. Entrance Three Sovereigns; three entrances or no race.

FOURTH RACE.

The BEATEN PURSE of twenty sovereigns, with a sweepstakes of three sovereigns each, for all beaten horses during the meeting, to be handicapped by the Stewards, or whom they may appoint, one mile and a half; post entrance.

WEIGHTS.

	st.	lb.
Two years old	7	0
Three years old	8	0
Four years old	9	0
Five years old	9	8
Six, and aged	9	12

Mares and geldings allowed 3 lb. (except in those races where the weights are specified.)

Winners to carry extra weight at the discretion of the Stewards (not exceeding 10 lbs.), to be declared from the stand at the conclusion of each race.

In all races where not less than three horses start, the second horse to receive back his stake.

All horses (except for the St. Leger and Trial Stakes) to be entered at the Royal Hotel on Saturday, May 17th, between the hours of seven and nine, P.M.

No person allowed to enter a horse who is not a subscriber to the amount of £3 (except for the Tradesmen's Cup, Welter Stakes, or any hack race, for which a subscription of £1 1s. will qualify).

All matches to be run on the second day, for which permission must be obtained from the Stewards; and the owner of each horse not a subscriber to the amount of £1 1s. to pay £1 1s. to the Race Fund before starting.

The colours worn by the riders are required to be named at the time of entrance; any jockey changing his colours to pay a fine of two sovereigns before starting.

Any jockey starting before the word "Off" is given by the person appointed, to pay a fine of two sovereigns.

Each winner to pay two sovereigns towards the Race Fund.

All decisions of the Stewards to be final.

To start each day at one o'clock *precisely.*

N.B.—All dogs found on the course to be destroyed. 2215

HOMEBUSH RACES.—1845.

A RACE DINNER will be held at the Royal Hotel on Thursday, May 22nd, Benjamin Boyd, Esq., M.C., in the chair. Applications for tickets (not transferable) to be addressed to the Stewards of the Races, at the Royal Hotel. Dinner on the table at seven precisely. Tickets, 13s. each.

JOHN ROSE HOLDEN,
5998 Honorary Secretary.

HORSE-SHOEING.

JAMES JOHNSON begs most respectfully to intimate that he intends to continue the horse shoeing branch of the business hitherto conducted by Mr Stewart, Veterinary Surgeon, at the corner of Pitt and Liverpool streets. Having been nearly eight years in the service of Mr. Stewart J. J. trusts he will be found worthy of a share of public patronage. 6004

MR. FRANCIS M'EVOY, Surgeon, begs to inform the inhabitants of Yass, and the adjoining districts, that he has rented from the 1st of May next, the house hitherto occupied by James Ellis, R.N.

The latter gentleman has also made over to him the good-will of his practice. A Drug Establishment, including Sheep and Cattle Medicines, together with apartments for the sick, will be added to the business.

Yass, April 14. 5862

ENGLISH AND FOREIGN NEWSPAPER OFFICE,

320, STRAND, LONDON.

JOSEPH CLAYTON, Publisher of the *Spectator*, and General Newspaper and Advertising Agent, 320, Strand, London, respectfully announces to proprietors of colonial journals, and the resident colonial gentry, that he is able to supply them with the *Spectator*, *Colonial Gazette*, and every other London and country newspaper in Great Britain, by the earliest conveyance after the appearance of each publication.

J. Clayton has been induced to pay particular attention to this branch of the newspaper business, in consequence of the complaints of the colonial press in not being supplied with English newspapers with that regularity and despatch which is necessary to the success of a well-managed colonial newspaper establishment.

It will be absolutely necessary to accompany each order by payment of six or twelve months' papers in advance, or a reference to some firm in London for payment at the expiration of the twelve months; in which case one halfpenny extra will be charged on each paper.

J. Clayton trusts that his connexion with the *Spectator* newspaper, as printer and publisher, from its commencement in 1828, will be considered a sufficient guarantee for the proper application of any funds paid in advance for English newspapers and periodicals

The prices are the same as charged in London; therefore all postage or extra charges incurred in the transit must be paid by the parties at the time the order is given.

It will be desirable in all cases where any advantage exists in the mode of conveyance over the ordinary means of transmission, that gentlemen, desirous of availing themselves of such advantage, should point out clearly in what way such peculiarity can be rendered available for the purpose of accelerating the despatch of such newspapers.

Orders for advertisements received and promptly inserted in all the foreign and colonial journals, and in the London and country newspapers and magazines.

FOREIGN AND COLONIAL AGENCY AND COMMISSION OFFICE,

18, CORNHILL, LONDON,
(OPPOSITE THE ROYAL EXCHANGE.)

To Merchants, Commercial News Rooms Public Libraries, Agricultural Societies, Officers of the United Services, Printers, Publishers of Newspapers, and Residents in the Colonies generally.

P. L. SIMMONDS, in returning thanks to his numerous Friends, and the Colonial Public in general, for the large share of patronage and support which he has received during the past six years, takes leave to inform them, that in consequence of the rapid influx of business from all parts of the world, and the great portion of his time which has hitherto been occupied by the editing and publication of the *Colonial Magazine*, he has taken into partnership Mr. FRANCIS CLOWES, a gentleman of first-rate talent and respectability, and that the business will be henceforward carried on under the Firm of SIMMONDS AND CLOWES; and he respectfully solicits for the Firm that continued share of patronage and support which it will be their earnest endeavour to merit by promptitude, untiring energy, continued zeal, and moderate charges

SIMMONDS AND CLOWES, as General Agents and Commission Merchants, beg leave to acquaint the Colonial Public, that they are now ready to receive orders for supplies of any kind and quantity, and goods of every description, of first-rate quality, at the very lowest market prices of the day, and to transact business upon the most liberal terms, provided they are previously furnished with funds or drafts at either long or short dates, or a reference to some London or Liverpool house for payment.

SIMMONDS AND CLOWES will continue to receive consignments of merchandise, to be sold on commission, and upon the receipt of the bills of lading will accept drafts at three months for two thirds of the amount. Consignments entrusted to their care will meet with every possible despatch in their disposal, and the sales be conducted with the greatest attention to the interests of the consigner.

An extensive knowledge of general business, and the experience of so many years as Colonial Agents in London coupled with promptitude, attention, and judgment, will, they trust, enable them to give satisfaction to those who may favour them with their commands

⁂ In consequence of the extensive correspondence of the firm, they have to request that all letters may be post paid. 8656

NORTH AND SOUTH AMERICAN COFFEE HOUSE.

MR. SAMUEL DAVIES, elder son of the late James Davies, deceased, and administrator to his estate, begs most respectfully to inform the members of the Subscription Room, from whom his late father received so many acts of support and kindness during his lifetime, that he has determined to carry on the business of the Subscription Room in all its departments, as it has existed during the last sixteen years, as well as of the tavern and hotel; and he trusts, with numerous improvements, now in progress of fulfilment, with regard to the quantity, quality, and priority of information from every quarter of the world. To accomplish these objects no pains or expense will be spared: and Mr. Samuel Davies hopes, in consequence, that he will receive from the members of the Subscription Room some portion, at least, of that support which enabled his father to render it the centre of political and commercial intelligence.

Arrangements are in progress, and will speedily be completed, for placing in the hands of the members of the Subscription Room not only the earliest intelligence which may reach, Bristol, Liverpool, Falmouth, Portsmouth, Dover, &c., but also by Mr. Waghorn's express, whatever can be forwarded by him from Egypt, India, and China, and at the same time as the news are received by the morning and evening newspapers.

It is confidently hoped that attention to the interests and wishes of the members of the Subscription Room will afford general satisfaction, and Mr. Samuel Davies begs further to state that for the accommodation of those who may honor him with their favours in the tavern and hotel department, or the North and South American Coffee House, he has laid in a complete wine stock of the most superb wines, spirits, malt and other liquors, which it is possible to procure and to which he begs to call their attention.

TO ELECTORS OF THE SYDNEY DISTRICT COUNCIL.

GENTLEMEN,—I beg to announce that I intend to become a candidate for the ensuing election of District Councillors; and should I be favoured with your suffrages so as to be elected, I pledge my utmost exertions to the repairing of the Roads, Bridges, &c., in the District.

I am,
Gentlemen,
Your obedient servant,
6009 THOMAS HYNDES.

THE SHIPPING GAZETTE, AND SYDNEY GENERAL TRADE LIST.

THE Fifty-seventh Number of the *Shipping Gazette* was published on Saturday, and will be continued every Saturday afternoon.

Contents:—Arrivals and Departures of Shipping for the week; Imports and Exports for the week; Clearance; the Shipping Intelligence of the week, including News from the Outports, Port Phillip, South Australia, and Cape of Good Hope; Ships in Harbour; Ships loading for England; Star Rock, Blind Bay; the New Custom House; Moreton Bay; Breakwater in Table Bay; Commercial Remarks; Colonial Produce; Quantity of Spirits and Tobacco in Bond; the Wool Market; Sheep or Cattle for Hongkong; Export of Gum; Freights, &c.

TERMS:	£	s.	d.
One copy, per quarter	0	7	6
Two copies, ditto	0	12	0
Three copies, ditto	0	16	6
Four copies, ditto..........	1	1	0
Six copies, per annum	5	0	0

KEMP AND FAIRFAX, Proprietors.

⁂ Advertisements received for the above till ten o'clock on the mornings of publication. Terms same as for the *Morning Herald.*

H. E. I. Co.'s Depot,
Bungarrabbee, 18th April, 1845.

TENDERS for Bills, to be drawn by the undersigned, at ten days' sight, on Her Majesty's Colonial Governments of Hongkong and the Mauritius, and the Indian Governments of Bengal, Madras, and Bombay, respectively, will be received until the 25th inst., the most favourable of which, if approved of, will be accepted.

The tenders to be sealed, and in duplicate, and to state the rates in sterling money per Spanish dollar and Company's rupee, for the Bills on China and India.

ARBUTHNOT DALLAS.
5877 H. E. I. C. S

A CARD.

THE present residence of Dr. Francis Campbell, late of Maitland, is No. 68, Hunter-street. 5864

TEETH.

MASTICATION AND ARTICULATION IMPROVED AND GUARANTEED.

MR. J. EMANUEL, Examined Surgeon-Dentist, Brévété du Roi d'Hollande, continues to restore decayed teeth, however large the cavity, or however painful, with his celebrated cement, instantly curing tooth-ache, rendering the operation of extraction unnecessary. Mr. J. Emanuel calls the attention of the gentry and the public to the newly-discovered SILICIOUS TEETH, under the patronage of the Royal Family in Europe, guaranteed never to discolour, break, or decay, being of surpassing beauty, defying detection, and fixed without springs or wires, without extracting the old stumps, or giving any pain. Sets of teeth by self adhesion. Obturators on a new principle. Loose teeth fastened occasioned by the scorbutic tartar collecting about the necks of the teeth, which stagnates, and pollutes the breath. Instantaneous relief for the tooth-ache, sold in bottles from 2s. 6d. to 5s. Teeth stopped with gold leaf. Teeth extracted, 2s. 6d. Children's teeth carefully attended to. At home from 9, A.M., till 6 P.M.

REMOVAL.

N.B.—Mr. J. Emanuel begs to acquaint his numerous connexion, and the public in general, that he has removed to No. 486, above Mr. Ellard's, Music Saloon, George-street North, opposite the Barrack Gate. 4496

STAY AND CORSET BUSINESS.

MRS. HOBBS begs to inform the ladies that she continues to carry on the stay and corset business, privately, in the same house as heretofore since her removal from Hunter street. And she takes this opportunity of returning her grateful thanks to the ladies of this and the adjacent colonies generally, for the extensive patronage received during the last ten years

Please to observe —476, George street, opposite the Barracks (private entrance). 5474

BOTTLED ALE AND PORTER.

ON SALE at the stores of the undersigned, about five hundred dozen Barclay, Perkins, and Co.'s Shipping Ale and Porter, ex *Sultana* and *General Hewett.*

5970 SWAIN, WEBBS, AND CO.

OLD CRUSTED PORT, 10s. 6d. per single dozen
A delicious sample, 16s. ditto ditto
Good dinner Sherry, 10s. ditto ditto
Very prime, 12s. 6d. ditto ditto
Very best, 15s. ditto ditto
Sherry and Port on draught, 4s. 6d. per gallon
London bottled Ale and Porter, 7s. 9d., good brands

To be had of J. G. WALLER, Wine Merchant,
5370 Late Bank of Australia, George-street.

FOR SALE, at the Stores of the undersigned,—
Coffee, Manila and Java
Sugar, refined
Tea, Hysonskin
Tea, Congou, in boxes.

SMITH AND CAMPBELL,
5960 Campbell's Wharf.

MR. CADELL, No. 3, Bridge-street, has for sale BOOK ISINGLASS, for brewers.

April 19. 5948

SEED WHEAT FOR SALE.
R. CAMPBELL, TERTIUS, Bligh-street.
5942

DAY AND MARTIN'S BLACKING.

ALL sorts of rubbish is now made up in Sydney, and sold for Day and Martin's. To prevent imposition, buy

GENUINE WARREN'S BLACKING,

At the following prices:—
Largest size, quarts, 11s. per dozen
Second ditto, pints, 7s. ditto
Third ditto half pints 3s. 9d. ditto
Or, at 1s. 8d and 4d, by the bottle.
To be obtained at

ELLIOTT'S,
6015 Charlotte-place.

ON SALE at the Stores of the undersigned—
Bass's Burton ale
Taylor's draught porter
Martell's and Henessy's brandy
Rum, &c., in and out of bond.

ECCLESTON AND HIRST,
6020 Queen-street.

LIVERPOOL SALT,

COARSE AND FINE, on sale by ECCLESTON AND HIRST,
6019 Queen street.

SUPERIOR MANILA CIGARS, ex *Margaret, Velocity, Mumford, Autumnus, Elizabeth, Osprey,* (at Hobart Town), and other arrivals.

W. H. ALDIS,
6014 Tobacco Merchant.

ON SALE, ex *Eliza, Anne Carr, Caledonia,* and other late arrivals, at the Stores of the undersigned—
An extensive and general assortment of Manchester Goods.

ALSO,

Woolpacks
Candlewicks
Refined Saltpetre
Liverpool, St. Ube's, and rock salt.

JOHN ROSTRON, Factor and Agent.
Manchester Warehouse, No. 2, Spring-street.
April 17. 5852

JUST LANDED, EX "CALEDONIA"

AND ON SALE BY PRIVATE CONTRACT,
BY MR. R. FAWCETT.

BLANKETS, assorted sizes
Twilled regatta shirts
Twilled regatta shirtings
Striped shirts
Regatta shirts
Regatta shirtings
4-4 cotton check
4-4 union check
Moleskin trousers
Patent imitation Welch flannels
Coloured counterpanes
White counterpanes and Marseilles quilts
Cotton ticks
Stout bleached cotton sheeting
4-4 stout black casbines
Assorted colours in casbines
9-8, 5-4, and 6-4 Turkey red, plain, and twilled cloth
Chintz Turkey red handkerchiefs and shawls
English tweeds
7-8, 9-8, and 5-4 navy blue prints
Drab moleskins
6-4 assorted Orleans cloth
Alpaca and Cobourg cloths
Horrock's longcloth
Dark fancy assorted prints
Lilac cambric prints
Superfine wool-dyed black, blue, and coloured cloths
Fine drab cassimeres and kersey cloths
Fine blue and coloured beaver and pilot cloths
33, 36, and 40 inch grey domestics
Supers, shirtings, and sheetings
Rolled jacconets and silesias
Welsh and swanskin flannels.

481, George-street, April 17. 5775

TO CHEMISTS, DRUGGISTS, STORE-KEEPERS, AND OTHERS.

ON SALE, at the Stores of the Undersigned,
427, GEORGE-STREET, SYDNEY,
Ex *Elisa, Ann Carr,* and other late arrivals.

Acid, tartaric	Lig. Vol. C. C.
" sulphuric	Lac. sulphur
" muriatic	Lign. quassiæ
" hydrocyanic	Lavander water
" citric	Magnes. calc. and sul.
Antimony, powder	Morphiæ, acet. and mur.
" crude	
" butter of	Measures, grac. and mouth mirrors
Alum	
Arsenic	Novargent
Argent, cyanid.	Nuc. vomica and pulv.
Blue, Prussian, and smalt	Papers, blue and white
	Pill boxes, should.
Butler's marking ink	Plumbi, acetas
Brushes, nail, flesh, and cloth	Poppy heads
	Peppermint pipe
Balsam, Canada	Patent wash. powder
Chalk, red, common	Pulv. jalape, cubeb. gentian, rhei
Creta, ppt., præcip., and gallic	Pulv. aconiti, acaciæ, myrrh
Chloride lime and soda, in solution	Pulv. aloes, sennæ, digitalis
Cubebæ pulv.	
Croci in fœno, and cochineal	Pulv. fœniculi, dulc. calumbæ
Calaminaris, lapis	Pulv. canella, cinnam. ver.
Cort., cinch. and pulv.	
" canella pulv.	Potas. nitr., acetas, fusa, sulphuret
" cassiæ pulv.	
" cinnam. ver.	Potas, prussiat, sulph. pulv.
Castor oil, very fine	
Conf. sennæ and rosæ	Quininæ sulphas
Capsules, copaiba, and castor oil	Rad. spigelia, sarzæ, jalapa
Ext., cinch. & rhatan.	Rad. colchici, zinzib. rhei
" papaver	
" sarzæ, co.	Rowland's kalydor and odonto
" conii	
" strammon.	Sir James Murray's fluid magnesia and acidulated syrup
" taraxaci	
" coloc. co.	
" anthem.	Surgeons' tow
" gentian	Soap, soft, and Windsor brown
" rhei	
" belladonnæ	Saucers, pink and blue
" aconiti	Sand tablets
" hyoscyam.	Sago
" acet. colchici	Secale cornut.
Emp. picis, co.	Sem. carui, cumini, mustard
" roborans	
" opii	Sem. cardam nim. linseed
" belladon.	
" amm. hyd.	Salacine and strychnine
Ferri, carb., and percyanid.	Sp. æther nit.
Ferri, citras and quinine	" Ammon. ar.
	" " Fœtid.
Fuller's earth	Twine, druggists' shop
Flowers, chamomile	Oleum. lavand. ang., ætherium
Fol rosæ	
Fluid, ext sarsaparilla	Oleum. amygd. ess, caryoph.
Gallæ, pulv.	
Gold leaf, and beaters' skin	Oleum. menth. sat. and pulegii
German and French night floats	Oleum. origani, piment, rutæ
Graham's chemical polishing paste	Oleum. absinth, myrist, anethi
Gum elemi, sagapen. styrox col.	Oleum fœniculi, dulc. neroli, opt
Gum sandrach, and myrrhæ	Oleum croton, tigl., amygd., dulc.
Harness waterproof composition	Oxley's essence of ginger
Hydrargyrus	Ede's perfumery, great variety
" and cret.	
" oxym.	Zinci. chlor., oxyd. sulph. pur.
" pilul.	
Isinglass	BLUE STONE, EPSOM SALTS
India-rubber rings	
Linseed and meal	CORROSIVE SUBLIMATE
Lig. Opii. sed.	OIL VITRIOL
Lig. Ammon. conc.	OLIVE & CASTOR OILS,
" Opt.	
&c.,	&c., &c.

5338 R. M. ROBEY.

FOR SALE, EX "CALEDONIA,"

EIGHT bales superior 27-inch hemp woolbagging
Ten bales superior ¾ striped hemp sacks.

GADSDEN AND SUWERKROP,
3, Jamison-street. 6001

EBENEZER COALS.

THE reduced price of this large and superior coal is now delivered at 16s. per ton of 28 bushels 15s on the Wharf.

Newcastle coals at the same price.

Orders left at the Ebenezer Wharf, bottom of Market-street, or at the undersigned's, next door to the Royal Hotel, will be punctually attended to.

6046 THOMAS ROBINSON.

NEWCASTLE COAL.

THE price of Coal at the Australian Agricultural Company's Wharf, Miller's Point, will be sixpence halfpenny per bushel, from this day, 1st of March, 1845.

	s.	d.
14 Bags, delivered from the Wharf ..	16	2
14 Bags, delivered in the City	17	6
14 Bags, delivered at Woolloomooloo, Glebe, &c.	19	10

All payments to be made previous to delivery, to Mr. F. Ebsworth, Bligh-street, or Miller's Point, where orders will be received.

P. P. KING,
Commissioner Australian Agricultural Co.
5365

FINE WOOLLED SHEEP,

IN THE COUNTY OF ROXBURGH.

6860 SHEEP, warranted clean, and never to have been diseased, for sale, with or without the following Stations, at which they are now depasturing, viz.: Jews Creek, Running Stream, Bandenorah, Crown Ridge, Dalhunty's Creek, Willawa, and Coolacingel Ford.

Apply to William Hall Palmer, Esq., Kirkconnel, near Bathurst; or to

WILLIAM C. BOTTS,
4143 Wharf, Darling Harbour, Sydney.

600 HEAD CATTLE.

TO BE SOLD by private contract, a mixed herd of superior bred quiet cattle running in the New England District. Apply to

SAMUEL LYONS,
George-street and Charlotte-place. 5809

FOR SALE, 1481 Sheep, now running on the Clarence. Apply to

CAPTAIN SCOTT,
5793 Prince-street.

TO DRAPERS AND OTHERS.

AN ELIGIBLE OPPORTUNITY offers to any persevering and industrious person wanting an established concern in the above line, in Victoria House, George-street, Parramatta, late in the occupation of Mr. Samuel Walker, but for the last two years carried on by Mr. Newman, for the firm of Appleton and Co., Sydney. The shop is attractive and well situated; and the stock, in terms and amount, will be arranged on a liberal scale to an intending purchaser.

Apply to
APPLETON AND CO.,
5736 Pitt-street.

FOR SALE,

A COTTAGE in Castlereagh-street, price £400;
20 acres land and stone house on Parramatta River, price £500;
Mansion and grounds (5 acres) desirably situated close to Sydney, price £2500.

TO LET,

Residence in a preferable part of the City, rent £80 per annum;
Those capital stone-built premises occupied by the undersigned, or the stores, cellar, and office only—Rent very moderate.

W. BARTON,
6034 591, George-street.

"HARP OF ERIN" PUBLIC-HOUSE BURROWA.

CERTAIN INDEPENDENCE IN A FEW YEARS FOR ANY CAREFUL INDUSTRIOUS COUPLE.

TO BE LET OR SOLD, that well-known licensed public-house "Harp of Erin," on the Southern Road, containing ten large rooms, with kitchen and good stabling detached, all in first-rate repair, with thirty acres of land substantially fenced and divided for paddocks, with plenty of water, as the property has a frontage to the river.

A more desirable opportunity could not occur for any industrious couple with a small capital, as a competency is sure in a few years. There is a garden of twelve acres, which grows everything required, as the late Mr. Davis spent a large sum for its cultivation, and the land for agricultural purposes stands secondary to none in the colony.

As the inhabitants have petitioned the Governor for a military force to be stationed at Burrowa, there is little fear of a similar event taking place. The decease of the late occupant being the sole reason that the proprietor wishes to discontinue that establishment.

On the premises is a lot of fixtures, which, with the license, can be taken at a fair valuation.

Applications to be made (if by letter, post-paid) to Mr. Isaac Levey, Australian Warehouse, George-street, Sydney; Mr. Samuel Davis, Australian Store, Goulburn; or Messrs Myers and Alexander, Yass Store, Yass. 5085

FOR SALE OR RENT,

THE Estate and Lands called Riverston and Mount Macquarie, in the neighbourhood of Windsor, containing about 3500 acres For terms and particulars apply to

F. BEDDEK, ESQ.,
5799 Windsor.

TALLOW.

THE undersigned are buyers of Tallow.

RAY AND GLAISTER.
Jamison-lane, Jamison-street. 5994

THE undersigned will purchase Wool, Oil, or Tallow, for Cash, or advance on the same, consigned for sale to their friends in London, Messrs. John Gore and Co.

GRIFFITHS, GORE, AND CO.,
5059 Bent-street.

WILLIAM JOHNSON, *Heber*, 1837, from Belfast, county Antrim, seven years, is requested to communicate his address to his brother David, care of Postmaster, Yass. 5865

NOTICE.

SHOULD this meet the eye of Mr. Thomas L******n, who arrived in this colony per ship *Dulina*, Captain G Underhill, about three years since, he will please leave his address, directed to J. L., at the *Herald* office, as an old friend, just arrived from England, would be glad to communicate with him.

Sydney, April 21. 6088

SHIPPING INTELLIGENCE.

ARRIVALS.—None.

DEPARTURE.

April 21.—*Australian*, barque, Captain Wilcs, for the Sperm Fishery.

CLEARANCES.

April 21.—*Palestine*, barque, Captain Sim, for London. Passengers—Mr. and Mrs. Braim, five children, and three servants, Mr. T. R Benson, Mr J. W. Thain, Miss Marian Connor, Dr. M'Williams, R.N., Surgeon.

April 21.—*General Hewett*, ship, Captain Hart, for London. Passengers—Mr. W. C. Botts, Mr. H. Tane, Mrs. Smith and servant, Master Darby, Mr. Holt, Mr. Donald M'Intyre. Mr. Aikman, Mr. Shuttleworth, and Mr. M'Donald.

COASTERS INWARDS.

April 21.—*Neptune*, 15, Horpin, from Brisbane Water, with 4000 feet timber, 20,000 laths, 10,000 shingles; *Sophia Jane*, steamer, 156, Stericker, from Morpeth, with 41 bales wool, 10 casks tallow, 26 bags barley, 37 trusses hay, &c.; *Echo*, 21, Johnson, from the Hunter, with 500 bushels wheat, 400 bushels barley, 250 bushels maize; *Eclipse*, 21, Brookes, from the Paterson, with 500 bushels wheat, 300 bushels maize, 150 bushels barley; *Harriet*, 15, Crause, from Brisbane Water, with 20,000 shingles, 5000 feet timber; *Peacock*, 15, Chapman, from the Hawkesbury, with 740 bushels wheat; *Mary Ann*, 12, Farrier, from the Hawkesbury, with 400 bushels shells; *Thistle*, steamer, 127, Mulhall, from Morpeth, with 27 casks tallow, 47 trusses hay, 300 bushels grain, &c.; *Bard's Legacy*, 33, M'Neil, from Wollongong, with 150 bags potatoes, 300 bushels wheat.

COASTERS OUTWARDS.

April 21.—*Harriet*, 15, Crause, for Brisbane Water, with sundries; *Stranger*, 27, Croad, for Morpeth, with sundres; *Neptune*, 15, Horpin, for Brisbane Water, with sundries; *William the Fourth*, steamer, 53, Wiseman, for the Clarence River, with sundries; *Sophia Jane*, 156, Stericker, for Morpeth, with sundries; *Harlequin*, 60, Boyle, for Newcastle, with sundries; *Mary Ann*, 12, Farrier, for the Hawkesbury, in ballast; *Thistle*, steamer, 127, Mulhall, for Morpeth, with sundries.

IMPORTS.

April 21.—*Rover's Bride*, cutter, 49 tons, Captain Padden, from Anatam: 32 tons sandalwood, 1½ ton sulphur, 1 bag ginger, Thacker, Mason, and Co.

EXPORTS.

April 21.—*Autumnus*, barque, Captain White, for London: 152 bales wool, Cooper and Holt; 25 bales wool, C. Appleton and Co.; 13 bales wool, Lamb and Parbury; 11 bales wool, Donaldson, Dawes, and Co.; 268 bales wool, R. Ramsay, senior, and Co.; 17 bales wool, 7 casks tallow, 5 bales leather, Betts and Panton; 15 bales wool, Harper, Blundell, and Co.; 32 bales wool, B. Boyd and Co.; 459 bales wool, 14 casks tallow, 4 cases portable soup, F. Ebsworth; 33 bales wool, M. C. O'Connell; 112 bales wool, A. Brierly; 156 bales wool, 34 casks tallow, Griffiths, Gore, and Co.; 21 casks tallow, Philip Dignan; 34 casks tallow, R. W. Robinson; 207 hides, D. and J. Dickson; 382 hides, L. and S. Spyer; 4000 trenails, W. White; 9½ tons manganese, 2 tons copper ore, J. Taylor.

April 21.—*General Hewett*, ship, Captain Hart, for London: 708 bales wool, 36 casks tallow, 29 casks gum, J. T. Armitage and Co.; 10 bales wool, 2 cases plants, 2 cases specimens of natural history, 1 case—a picture, J. L. Montefiore; 204 bales wool, 33 casks tallow, 51 hides, B. Boyd and Co.; 33 bales wool, Thomas Holt, jun.; 99 bales wool, Lyall, Scott, and Co.; 59 bales wool, Barton and Darvall; 7 bales wool, James Taylor; 24 bales wool, William Hindson; 65 bales wool, Lamb and Parbury; 13 bales wool, D. Jones and Co.; 4 bales wool, W. M'Donell; 6 bales wool, William Wilton; 6 bales wool, Pelham Dutton; 276 bales wool, 1 bale sheepskins, 146 casks sperm oil and head matter, Flower, Salting, and Co.; 3 bales wool, C. Malpas; 6 bales wool, J. S. Willis; 9 bales wool, 34 casks tallow, D. M'Intyre; 62 bales wool, 3 casks seeds, 1 cask gum, W. Walker and Co.; 10 bales wool, 62 planks flooded gum, 15,010 trenails, 32 casks gum, John Hart; 11 casks tallow, J. Solomon; 11 casks tallow, Swain, Webbs, and Co.; 14 casks tallow, Ray and Glaister; 14 casks tallow, R. Towns; 7 casks tallow, R. M. Robey; 67 casks tallow, 251 hides, Thomas Agars; 46 casks tallow, Edward Knox; 2 casks tallow, J. P. Robinson; 39 casks tallow, R. W. Robinson; 21 casks tallow, Charles Chapman; 7 casks tallow, 23 hides, 3 chests apparel, J. Simmons; 195 casks sperm oil, Cooper and Holt; 131 casks sperm oil, W. Debney; 2000 hides, L. and S. Spyer; 210 hides, Moses Joseph; 39 bundles whalebone, 26 bundles flax, 6 packages clothing, C. Malpas; 1 case of specimens of natural history, Hibert; 4 cases specimens of natural history, Verreaux, 1 case silks, E. Taylor; 15 tin packages gelatine, W. T. Boyce; 1 case apparel, C. Chapman; 9 boxes gum, W. Wright; 1 violoncello, W. Christie.

April 21.—*Palestine*, barque, Captain Sim, for London: 116 bales wool, George Wyndham; 287 bales wool, 6430 treenails, W. C. Botts; 45 bales wool, R. Gill and Co.; 71 bales wool, John Taylor; 159 bales wool, Cooper and Holt; 51 bales wool, B. Boyd and Co.; 15 bales wool, 57 casks tallow, Smith and Campbell; 84 bales wool, 4 casks and 1 case gelatine, 2 cases artificial flowers, Thomas Smith and Co.; 75 bales wool, H. Meinertzhagen and Co.; 160 bales wool, 400 hides, 87 casks tallow, Robert Towns; 104 bales wool, Francis Lord; 80 bales wool, J. T. Armitage and Co.; 49 bales wool, 67 ox hides, Thomas Agars; 62 bales wool, Tingcombe and Watkins; 36 casks tallow, Edward Lane; 7 casks tallow, A. Fotheringham; 1 case specimens natural history, A. Dunn; 195 bales wool, W. Walker and Co.; 13 bales wool, E. Cory.

VESSELS EXPECTED IN SYDNEY.

FROM LONDON.

Penyard Park, 377 tons, Weller, December 15.
Ann, 800 tons, Thorne, January 5, with troops.
Royal Tar, 339 tons, Bell, January 15.
Amelia, Teasdale.
Jane Goudie, 233 tons, Goudie.

FROM LIVERPOOL.

Superior.

FROM PORT PHILLIP.

Parkfield, ship, 496 tons, Whiteside.
Martha and Elizabeth, schooner, 81 tons, Pockley
Wave, schooner, 65 tons, Birkinshaw.
Shamrock, steamer, 200 tons, Gilmore.

FROM HOBART TOWN.

Louisa, brig, 182 tons, Tucker.

FROM LAUNCESTON.

William, brig, 149 tons, Thom.
Mary Ann, schooner, 51 tons, Amner.

FROM NEW ZEALAND.

Comet, schooner, 100 tons, Cork.
Caledonia, barque.
Shepherdess, schooner.
Kate, schooner.
Maid of the Mill, schooner.
Scotia, schooner, 68 tons, Ward.
Velocity, schooner, 138 tons, Truscott.
Aurora, schooner, 50 tons, Turner.
Lady Leigh, schooner, 118 tons, Reid.
Bee, brig, 134 tons, Unthank.
Terror, schooner, 95 tons, Dunning.

FROM THE SOUTH SEA ISLANDS.

Sarah Ann, schooner, 184 tons, Dunnett
Thomas Lord, schooner, 70 tons, Stwerkrop.
Portenia, brig, 221 tons, Richards.
Elizabeth, barque, 175 tons, Jones.
Ariel, schooner, 104 tons, Lewis.
Countess of Wilton, schooner, 111 tons, Bowles
Coquette, schooner, 72 tons, Rogers.

FROM CALCUTTA.

Royalist, H.M.B., 8 guns, Lieutenant Ogle, Commander.

FROM CHINA.

Alfred, brig, 125 tons, Napper.

FROM THE MAURITIUS.

Marian Watson, schooner, 146 tons, Reynolds.
Wanderer, schooner, 131 tons, Burns.
City of Sydney, brig, 106 tons, Williams

FROM MANILA.

Urgent, ship, 408 tons, Thompson.
Giraffe, brig, 264 tons, Harvey.
Cheerful, schooner, 123 tons, Patrick.
Meg Merrilies, ship, 314 tons, Thompson.
Sir John Byng, brig, 167 tons, Forbes.
Sarah, brig, 201 tons, Espinasse
Morayshire, barque, 315 tons, Smith.
Victor, barque, 334 tons, Morgan.
Julia, brig, 131 tons, Robinson.

FROM SINGAPORE.

Colombian, barque, 275 tons, Wakem.

London Mails.—A mail was put on board the *Autumnus* last night, but as she does not sail before to-morrow, another will be kept open for her until six o'clock this evening. The *Palestine* will also sail for London to-morrow, and it is expected that she will carry a large mail. The *General Hewett* will be towed to Watson's Bay to-morrow by a steamer, and will proceed to sea on Thursday morning at daybreak.

The *Scamander* and *Hydrabad* are about to be moved to the Circular Wharf, where the latter will commence taking in horses for Calcutta on Thursday morning. The *Ann Carr* having discharged her inward cargo, will move to Buchanan and Co's Wharf, to load for Liverpool. The *Union* is discharging at the Flour Company's Wharf.

The *Slains Castle*, on her return from New Zealand, will take in horses for Calcutta.

The *Martha* will leave for the Cape of Good Hope in a few days. Several steerage passengers have engaged berths by her.

The Great Britain Steam-Ship.—I had to detail the unsuccessful attempt made yesterday morning to get the *Great Britain* through the locks at Bristol. Workmen were, however, immediately employed to remove an additional portion of the masonary of the lock, and I am happy to say, that she last night passed safely through the lock, and lay outside the docks for the night, in order to be in readiness for this morning's tide. The *Great Britain* is built entirely of iron, with the exception of the flooring of her decks and the flooring and ornamental parts of her cabins. She is 322 feet in length from figure-head to taffrail, and 50 feet 6 inches in breadth. She is registered 3500 tons, builder's measurement, so that her bulk nearly equals that of any two steamers in the world. She has four decks, the lowest of which is of iron, and appropriated for the reception of cargo. The upper deck, with the exception of a small forecastle, is completely flush from stem to stern, measuring 308 feet. Besides the vast space appropriated to the passengers and crew, and that occupied by the engines, boilers, &c., she has sufficient room for the stowage of 1000 tons of coals and 1200 tons of measurement goods. There are three boilers, capable of containing 200 tons of water, heated by 24 fires, and she has four engines of 250 horse power each, making in all 1,000 horse power. She is divided into four compartments by bulk-heads. Some idea may be formed of her vastness, when it is stated that upwards of 1500 tons of iron have been used in the construction of the ship and engines. The *Great Britain* is fitted with the Archimedean screw propeller, which has six arms, and is 15 feet six inches in diameter, with a 25 feet pitch; the propeller itself is composed of 3 tons 16 cwt. of iron. The propeller is worked by a plate iron chain in four tiers, each tier consisting of three and two links alternately, the chain passing round an iron drum of eighteen feet diameter, on to a smaller one of six feet diameter, in the centre of which is the shaft, on which the screw revolves at a distance of about 150 feet. The shaft is made in four pieces, three of which are composed of solid wrought iron, of 14 inches diameter. The remaining one is hollow, of 2 feet 6 inches diameter and 2¼ inches thick. It is estimated that 54 revolutions per minute can be obtained from the screw.—*Correspondent, Times, December 13.*

DIARY.

MEMORANDA FOR THIS DAY.

April.		SUN, rises	sets	HIGH WATER, morn	eve
22	TUESDAY	6 31	5 29	8 54	9 18

Moon—Full, April 22, 16m. past 5, P. M.

ROYAL VICTORIA THEATRE

In preparation, the Exile King, the British Merchant, A Husband at Sight, Town and Country, &c., &c.

This Evening, April 22,

Will be repeated, an interesting Drama, in 2 Acts, founded on events during the reign of Charles II, entitled A KING AGAINST THE FIELD; or, THE ROYAL WAGER. Charles II. (King of England), Mr. James; George Villiers (Duke of Buckingham), Mr. Griffiths; Lilac Lovell and Chrystal Joyce (the King's favourite Pages), Mesdames Louise and Wallace; Flora (Maid of Honour to the Queen), Madame Carandini. A Song by Madame Carandini. A Pas de Deux, by Madame Veilburn, and Signor Carandini. To conclude with, by particular desire, the popular Scottish Operatic Drama, of JAMES, KING OF SCOTLAND; or, THE GABERLUNZIE MAN. The Gaberlunzie Man, Mr. Griffiths; Lilian, Madame Louise.

The Sydney Morning Herald.

TUESDAY, APRIL 22, 1845.

"Sworn to no master, of no sect am I."

THE BRIGHTENING PROSPECTS OF NEW SOUTH WALES.

"We are quite satisfied that one great source of relief for this overburdened old country, and of future strength and prosperity, lies in our colonies."—*Bankers' Circular, November 15, 1844.*

The *General Hewett* will carry home one of the largest and most valuable cargoes ever received by Great Britain from her Australian colonies: we are anxious that she should carry also a faithful account of the improved and still improving circumstances of New South Wales. We wish to convey to the numerous persons in the mother country who take an interest in our colonial affairs, a just conception of our present state, and of our unfolding prospects. We would employ no terms of exaggeration; we would present no highly-coloured picture; but confining ourselves to what we believe to be the measured language of truth, we would send home such a statement as should be worthy of credit there, and incapable of contradiction here.

The severity of our late depression has been pretty well understood in England, for, even in that distant land, its consequences have been rather extensively *felt*. We trust, too, that through the humble exertions of this journal, amongst other means, the *causes* of the depression have not been altogether mistaken. Throughout the whole of our four years' sufferings, and even when they had reached their most alarming crisis, we never wavered in our conviction, nor ever relaxed in our endeavour to convince others, that the disasters were in no wise chargeable upon the colony herself; that they had resulted from no failure of her natural resources; that all the internal elements of her former prosperity remained as sound and as expansive as ever; that an extreme over-estimate of the powers of those elements, and an infatuated attempt to extort from them by speculation the riches which patient industry alone could really evoke, had been the proximate causes of all our distress; and that when the colonists should have been brought to a sober view of their own duties and interests, the evils which had befallen them would gradually subside. This representation of our case was from time to time favourably received by the intelligent conductors of the British press, many of whom kindly lent their columns for its wider diffusion amongst British readers. Those for whose information our present article is penned will therefore have been prepared to hear of a beneficial reaction.

It was a truly fortunate contingency, that in the middle of the most disastrous of our four sad years—in the depth of the blackest winter that had ever frowned upon Eastern Australia—we should have lighted upon the discovery, the sudden and almost *instantaneous* discovery, of a new staple product, valuable, permanent, and illimitable. The fact, then for the first time ascertained, and till then not even thought of, that our flocks and herds could furnish an export second in importance only to our wool, rose like a star of hope upon our dark horizon. From that moment, tallow became a fixed source of income to the grazier, and a principal article of colonial commerce. Though the felicitous discovery was not made until June, 1843, yet by the end of the half-year we had exported no less than 284 tons; and by the end of the following twelvemonth, not less than 2830 tons. In the English market, our tallow has taken its stand in the first rank. According to the advices hitherto received, it has commanded a ready sale even in the dullest seasons, and realized the best prices. It may be supposed, therefore, that a new staple like this, in a country so favourable to its production, must have acted most benignantly upon the circumstances and spirits of the colonists. It would have done so, even had there been no other concurrent change for the better.

But the colonists had scarcely begun to avail themselves of this unexpected advantage, when good news began to arrive from the British wool market. Ship after ship brought out advices that trade in the mother country was reviving; and the price of wool continued to advance step by step, until it had reached a point which left to the flockmaster a handsome profit. At that point it has firmly remained. Here was another solace to our dejected community. Sheep-farming, which two years ago was on all hands pronounced a losing concern, is now the most profitable investment in the country. What with the high character of our tallow, and the remunerative prices of our fleece, our pastoral interest—the *ruling* interest of Australia—was never in a more auspicious position than at the present moment.

Add to these, that the entire system of colonial business has undergone a radical reform, and our friends in England will understand that we are in the right way for surmounting all our difficulties, and becoming a prosperous people. The days of speculation are over. Sound commercial principles are now in the ascendant. We buy to satisfy real wants, and those wants are governed by a severe economy. We sell for ready money, or restrict credit within limits the most prudent and secure. No man gives, no man dreams of asking, for land or stock, more than its *bonâ fide* value.

In this general improvement in our trading habits, our Banks have fully participated. Bitter experience having sharpened their faculties, they take good care to discount no paper but such as represents the real transactions of business, and is backed by adequate securities. The death of rash speculation in the market, has been the death of rash accommodation at the Banks.

As an illustration of our economy as consumers, and of our industry as producers, we may refer to the relative amounts of our Imports and Exports. Until the year 1844, the balance of trade had always been largely to the debit of the colony. In 1840 and 1841, when we were all mad together, our imports exceeded our exports by upwards of a million and a half sterling. In 1842, the excess fell (in round numbers) to £388,000, and in 1843 to £378,000. But in 1844, whilst our imports were only £931,000, our exports were £1,128,000, leaving a balance *in our favour* of nearly £200,000. In other words, for every £100 worth of goods imported by us, we exported produce to the amount of £121.

And of what is New South Wales now in want, to remove its remaining difficulties, and to give full flow to the tide of its prosperity? We want three things—an equitable settlement of the Crown land question; a continuous supply of labour; and the accession of families with capital. The first of these wants, we would fain hope—thanks to our Legislative Council, to our Pastoral Association, to Mr. Archibald Boyd, and to our friends in Parliament—is in a fair way of being met to our general satisfaction. For the supply of labour, destitute as we are of funds applicable to immigration, we must depend upon the prevalence, in the influential circles of England, of those sound principles of national policy which are so ably advocated by the paper quoted at the head of this article. Ministers cannot long shut their eyes to the fact, that it is their duty—a duty which is becoming daily more imperious—"to plant population where people are scant, to give the means of production where those means are wanting, and thereby prodigiously to augment the commercial resources of the empire." It is boldly asserted by the judicious writer whose words we have been using, *(Circular to Bankers)* that if the ruling powers had thirty years since duty appreciated their duty, "*the exports of the produce of British industry would at this instant of time have been greater to the subjects of the Crown alone, than the aggregate amount of exports are now to all parts of the world.*" Addressing the Queen's Government, the writer says—"The same amount as you have lent or expended on the Thames Tunnel, if it had been judiciously expended in Australia thirty or forty years since, would probably have been the means of giving you at this day two millions of customers more than you have in that country." "The great thing," it is added, "is for the Government to break down some of the enormous masses of capital lying almost useless in England, and distributing it judiciously in the colonies. Their tardy consent to supply the means of transporting labour from one part of the world to another is to be noted with approbation, although it would have been of much more value if it had been applied five years earlier." The information upon which it is here indirectly asserted that Ministers were about to assist in the work of emigration, is said by the writer to have been "obtained from a *trustworthy source*." We sincerely hope we may soon see fruits of its truth.

Our third want, families with capital, should be understood strictly as we have expressed it. We do not want capital *sent* out, but *brought* out. We do not want the colony to be worked with borrowed money, the interest of which is to be sent abroad. Of this mistaken system we have had by far too much already, and are now acutely suffering for its introduction. But we want capitalists to come out with their money, and apply it to the development of our resources, for the mutual benefit of themselves and of the colony. And to convince them of the rich rewards they would thereby reap, we need only refer them to the prices of wool and tallow in England, and to the price of sheep in New South Wales, reminding them that pasture lands, whether purchased or rented from private owners, or occupied under license from the Crown, may be had on the most advantageous terms. From these data it will be easy for them to compare the paltry returns derived from their capital in England, with those which would be realised in this country.

LAW INTELLIGENCE.

SUPREME COURT.—Civil Side.

Monday.

Before their Honors the three Judges in Banco.

[This being the first day of term their Honors took their seats on the Bench at a quarter to eleven, A.M., in full judicial costume.]

RETURNS

The Master in Equity presented a return of all moneys received under intestate estates, and a similar return particularising the receipts under each estate, both of which returns were directed to be filed.

The Second Clerk presented a return from the Prothonotary of the amount received by him for Court fees, &c., which return was ordered by their Honors to be filed.

FINES.

Mr. George Greensil Old, who had been fined in the several sums of £2, £5, and £2, for non-attendance on three consecutive days, produced an affidavit to the effect that he had ceased to be a householder and a member of the firm to which he formerly belonged; but the Court considered this to be an insufficient excuse, as Mr. Old's proper course would have been to have objected to the return of his name in the list. The fine of £5 was therefore maintained, but the other two fines were remitted.

Mr. John Macdonald, who had been fined £5 for a similar cause, had the fine remitted, upon making an affidavit to the effect, that having attended, he had been informed the Jury were discharged, and believing this to be true he had returned to his home.

A fine of £2 upon Mr. Archibald Walker was remitted, upon the ground that he had been formerly held excused owing to a difficulty of hearing; but was told by the Court that his proper course would have been to apply to the Magistrates, and to have his name erased from the jury list.

George Moss, who had been fined £3, had the fine remitted, upon the ground of having been incapacitated by illness from attending on the morning in question.

A writ of *capias profine* was directed to issue against David Baker, a witness whose recognizance had been ordered to be estreated for non-attendance at the Maitland Circuit Court; the Sheriff reported that the man had not yet been found.

MACDERMOTT v. DEVELIN.

The Chief Justice delivered judgment in this case as follows:—

This was a motion to set aside a writ of *fieri facias*, issued by the Resident Judge of Port Phillip, and directed to the Sheriff of New South Wales; or failing that, to restrain the Sheriff from executing it: on the ground, that there was no authority vested in the Resident Judge, in any case, or at all events in this case, to issue a writ so directed.

It appeared from the affidavits, that the plaintiff originally obtained judgment in this Court, at Sydney; and that he then, under 5 Vict. N. 9, s. 9, caused a memorial of such judgment to be transmitted to Port Phillip—whereby it became equivalent to, and capable of being acted on as, a judgment of the Court there. The plaintiff accordingly took out execution thereupon at Melbourne; under which the Deputy Sheriff took certain property, as the property of the defendant. A third party claiming that property, the case was brought before the Resident Judge, under the Interpleader Act; and the result of the matter was, not only a release of the property, but an Order, that the plaintiff should pay the costs of the proceedings. That Order, if wrong, might have been appealed from; but we must now deal with it, as a subsisting and valid Order, which the Judge had power to make, and properly made under the circumstances. It is to enforce that Order, (it having been previously made, we presume, a Rule of Court,) that the writ of execution now in question was issued.

It appears, that in fact the plaintiff was never resident at Port Phillip; and it was contended that the Resident Judge had, therefore, no jurisdiction over him—the provision in section 1. of the 5th Victoria being relied on for this objection. We are of opinion, however, that that section relates only to cases of *original* jurisdiction; and to persons who may, compulsorily, be made subject to it. The plaintiff here brought himself within the Port Phillip jurisdiction, for all the purposes of the judgment which he caused to be obtained there. The circumstance of his not having originally commenced the action there, we think makes no difference. That each branch of the Court, notwithstanding the exclusive original jurisdiction which we have referred to, has power to issue writs of execution to enforce its judgments, as well as writs of subpœna to compel the attendance of witnesses, in every part of the colony, is clear from the 4 Vict No. 22, s 13, and the 5 Vict. No. 9. s. 9. The former gives the power, in the plainest terms; and the latter (being the section next preceding the power, as to transmitting memorials of judgments,) expressly declares that it shall continue, the same as if that Act had not been passed.

The only question is, therefore, whether that branch of the Court, which issues a writ of execution in any such case, should or not direct it (or may not direct it) to the officer who ordinarily executes the process of the Court, in the place or district to which it is sent. We are of opinion, that the writ may be so directed; and we strongly incline to think, that it ought to be. However anomalous it may be that the same Court should be holden, under the same name, at two distant places, at one and the same time, it is plain from the tenor of both Acts, that there is but one Supreme Court for New South Wales. The Resident Judge at Port Phillip, is a Judge of that Court. It is in that capacity, that he is capable of being clothed with the exclusive original jurisdiction referred to. But he has also an auxiliary jurisdiction; which he may exercise in Sydney. The Judges here, in aid of *their* exclusive original jurisdiction, may exercise the same auxiliary jurisdiction at Port Phillip. The Sheriff, then, being the officer of this Court, seems to us as much under the authority of the Port Phillip Judge, for all purposes within that Judge's jurisdiction, as he is under the authority of the Judges in Sydney, for all purposes within their jurisdiction. It might, perhaps, have been supposed, that the Resident Judge could direct writs of execution, in these cases, to some officer appointed by himself. But, independently of other objections, the Charter directs that all process shall be executed by the Sheriff; and the Port Phillip *Deputy* Sheriff, (supposing the proper form of direction, *there*, to be to him, and not the Sheriff,) has no jurisdiction beyond that District.

The Rule obtained in this case is discharged; and with costs.

BYERS v. PEACOCK.

The Chief Justice deliv[illegible] judgment in this case as follows:—

Special *Assumpsit* for work and labour. The declaration stated, that the defendant's estate having been sequestrated, the plaintiff was appointed assignee; and that in that character, he bestowed his services in arranging the affairs, and collecting the property of the estate; and that afterwards, the said estate was released from sequestration; at which time, divers books were in the plaintiff's possession, as such assignee, which the defendant was desirous of having delivered up to him: that thereupon, in consideration that the plaintiff *would deliver to him the said books*, the defendant promised the plaintiff to pay him such compensation for the aforesaid services, as the Chief Commissioner for Insolvent Estates should certify to be reasonable. The plaintiff averred that he did accordingly deliver up *the said books*; and that the Chief Commissioner certified that the sum of £35 was a reasonable compensation; but that the defendant had refused to pay that sum. Plea, *non assumpsit*; with a second plea, unnecessary now to enter into.

At the trial, which took place before Mr. Justice a'Beckett, the defendant's promise was proved in all other respects, but there was some difficulty in ascertaining distinctly the consideration. The plaintiff, in point of fact, had in his possession books, as well as sundry other documents; and during the conversation which led to the promise, books as well as deeds, with some other documents, were referred to; and books, deeds, and other documents, were in fact delivered up. The witness finally declared, however, on being pressed, that the delivery bargained for was *deeds only*. It was objected, that this was a variance; the consideration alleged in the declaration being the delivery of *books*. On this, the plaintiff's counsel asked for and obtaided leave to amend; by inserting the words "deeds and other documents" after the word books. The defendant contended, that the variance was not then by cured; for that a promise, in consideration of the delivery of deeds as well as books, was not a promise in consideration of the delivery of books only. A further amendment was then applied for; namely, leave to substitute the word "deeds" for "books." This, however, the Judge refused; but he gave the plaintiff leave to move the Court, if necessary, as to that amendment. On the other hand, he refused to nonsuit; being of opinion, on the whole, that the proof was sufficient.

The Jury having found for the plaintiff, the defendant moved in the last term, pursuant to leave reserved, to enter a nonsuit, on two grounds;—first, that the Judge ought not to have allowed any amendment; and secondly, that notwithstanding that amendment, the proof failed to establish the consideration laid. On this first point, we were clearly in favour of the plaintiff. There are deficiencies of statement, no doubt, to which the power of amendment does not extend. But here, as the case stood, there was clearly a *variance*, within the meaning of the statute. The presiding Judge was justified, therefore, in permitting the plaintiff to amend, in order to cure it. (See *Clark* v. *Morrell*, 9 D. P. C. 461; and 1 M. & Gr 841; also, *Sainsbury* v. *Matthews*, 4 M. & W. 343.) Whether he succeeded in doing so, is the next question. On this point it was argued, that the variance, if any, was immaterial: but secondly, that there was in effect no variance—inasmuch as the allegation was, substantially, the delivery of *divers documents*; of which deeds and books were merely instances. In case the Court, however, should be against him on these points, Mr. Broadhurst applied for leave to make the amendment, secondly asked for by him.

We are of opinion, that there was in this case a fatal variance; and that the Court has no power, notwithstanding the leave reserved, to allow any amendment to remove it. The consideration proved was, that the plaintiff would deliver *deeds*. The consideration alleged is, that he would deliver deeds *and books*. The words "*and other documents*" which follow, do not appear to us to relieve the plaintiff from difficulty; but rather to increase it. In declaring upon any contract, the *entire consideration* for the promise must be set out; and set out truly. A very small discrepancy, in this respect, has repeatedly been held to constitute a variance. As in the case cited on the argument, where the consideration alleged was, the forbearance to sue for £21 6s., and the proof was a forbearance of £20 18s. (*Arnfield* v. *Bate*, 3 M and S. 173.) So, where the consideration alleged was, the procurement of *money*; and the proof was a procurement of *stock*—that is, in effect, money in the funds. (*Jones* v. *Brindley*, 3 Esp 205. And see *Bray* v. *Freeman*, 2 Moore, 114) In a more recent case, the consideration for a tenancy was alleged to be, the letting on a certain day, and repairing the premises within twelve months. The proof was of an agreement to do these things, and also to insure, and rebuild in case of fire. Although nothing turned on either of the latter clauses, the omission to state them was holden to be fatal. (*Beech* v. *White*, 12. Ad. and El. 668. See also *Clark* v. *Morrell*, already cited) It is true, that in this case, the proof shewed that less was imposed on the plaintiff, than he states himself to have undertaken. But the question of variance, it appears to us, remains the same. It was to prevent injustice from being done, by mistakes of this description, that the statute authorising amendments at the trial was passed. In the present case, however, one amendment was allowed; and we think that, under the circumstances, a second was properly refused. We are not, indeed, agreed on the question, whether the Judge have power to allow a second amendment in any case. But, at all events, we are of opinion that such amendments can be made, (where there is no special finding of the facts,) by the *Judge* only; and not by the Court in *banc*. (See *Jenkins* v. *Philips*, 9. C. and P. 766. *Brashier* v. *Jackson*, 6. M. and W. 558, and *Doe d. Poole* v. *Elrington*, 1. Ad. and El. 750.) The result is, that the nonsuit applied for in this case must be granted.

The question was not raised, whether a variance in proof, as to the *consideration*, can be taken advantage of, on *non assumpsit*. But, on this point, the cases of *Kemble* v. *Mills*, 9 D. P. C 446, of *Beech* v. *White*, and *Clark* v. *Morrell*, already cited, and of *Raikes* v. *Todd*, 1 P. and D, 138, are decisive; and the principle on which they rest seems plain. The plea of *non assumpsit*, before the new Rules, always put in issue the "contract." It in effect denied that there was such a contract as the one declared on; and in this respect, the Rules made no alteration. But a *contract* consists of two things; not a promise, simply, but a consideration supporting that promise. So that by disputing the contract, the defendant necessarily disputes the promise, and consideration also. The case of *Passenger* v. *Brookes*, (1 Bing. N. C. 587,) which seems opposed to this doctrine, is explained in *Bennion* v. *Davison*, 3 M. and W. 183. But, if it cannot be reconciled with the other cases, it must be taken to be overruled.

On the materiality of the variance, in this case, Mr. Justice a'Beckett is not quite prepared to concur in this judgment; but, on the other points, (that respecting the power of allowing a second amendment excepted,) we are unanimous.

DOE (ON DEMISE OF MAZIERE) v. O'BRIEN.

The Chief Justice delivered judgment in this case as follows:—

This was a motion, on certain points reserved, for the entry of a nonsuit. The cause was tried before the Chief Justice in May last, when the case appeared to be as follows. The subject of the action was a farm, near Parramatta, formerly the property of the defendant; purchased by the lessor of the plaintiff, at a Sheriff's sale, in the year 1831. The judgment under which that sale took place, being against the now defendant at the suit of one Taylor, was recovered on the 23rd July, 1831. A writ of *fieri facias* issued immediately on that judgment, returnable on the ensuing 25th August; and under that writ, in pursuance of the statute 54 Geo. III c. 15, authorizing the sale of lands in this colony for debt, the farm in question, then in possession of or claimed by the defendant, was sold by the Sheriff, on or about the 13th October following. Whether there was, at any time, an actual levy made on the land, was in dispute; but the fact of seizure, at any time prior to the sale, was certainly not proved; although an advertisement from the Sheriff's Office was put in, stating the levy, and notifying the intended day of sale. The bailiff's assistant, however, by whom it was supposed that the levy had been made, was unfortunately dead: so was the Sheriff; and so was the plaintiff's attorney—by whose instructions, it appeared, the sale had on one occasion been postponed. The bill of sale from the Sheriff to Maziere, was given in evidence; bearing date the 29th October. It recited the fact of a levy, but did not mention its date; and stated the sale to have taken place, on *or about* the 13th October. Shortly after the sale, the plaintiff was put in possession; and in that possession he has ever since remained, until recently; when the defendant dispossessed him.

The defendant's counsel applied for a nonsuit, on the ground of the defect in the proof, respecting the levy; and also on another ground, (on which, however, they did not much insist,) that there was a defect in the proof, as to the identity of the premises. As to the first of these, the plaintiff's counsel answered, that it must be presumed that the Sheriff did his duty; and therefore, as he *sold* the *farm*, that he had duly levied on it: but that, at all events, the Court would so presume, against this defendant; he being the defendant in the original action, who would be able to show how the facts were. The first point was reserved; and the second went to the Jury. The defendant then, in answer to the action, gave in evidence a grant to him from the Crown, *dated the 19th October*; which, although certainly prior to the Sheriff's conveyance, was *six days after the supposed date of sale*. Subject to the question which arose on this, whether the Sheriff could, in law, convey to a purchaser under him, any greater estate or interest than that on which he levied, or at all events than that which he *sold*,—and also subject to the point first mentioned,—the Jury found for the plaintiff

We have fully considered this case; and are of opinion, that a nonsuit must be entered. Whatever claims a purchaser under the Sheriff may have, under circumstances such as those which have been stated, it is sufficient to say that we could not, in this branch of our jurisdiction, give effect to them. The plaintiff in ejectment, must establish a *legal title*; and this, the plaintiff has here failed to do. To that title, we conceive that in a case of this kind, two things are essential; first a seizure, and secondly a sale. The latter was certainly shown; but, if we assume the former to have been shown also, (that is, not only a levy, but a levy pending the writ,) the question still remains, *what was sold?* No more, we apprehend, at all events, than the defendant *then* had; all his then "right, title, and interest." It was urged by Mr. Foster, that the sale took no effect till the *conveyance*; and that the Sheriff, therefore, then transferred to the purchaser the legal estate, which had been acquired in the interval. We cannot adopt this argument. The Sheriff could convey. we think, no more (*i.e.* no greater interest) than he sold. But it was contended, that the *sale itself*, as well as the conveyance, might have been after the grant; for that, as the date of sale was not absolutely fixed, it might have been on or after the 19th, instead of on the 13th October. It may have been so, no doubt: but if it had been, the plaintiff should have shown it

There would then, however, have been still a question; whether the Sheriff could *sell*, more than he *took in execution*. On this, as on the other points, our opinion is with the defendant. Assuming the levy to have been made before the return of the Writ, (and if not, it was illegal,) the Crown Grant was certainly then not issued. The defendant's title, therefore, at the most, at that period, was merely to *have a grant made* to him. The plaintiff considered, perhaps, that because the defendant claimed the land, the *land itself* was taken. But it appears clear to us, that no more was taken than the defendants *then interest* in the land. If that interest had been only leasehold, no more than a leasehold interest could have been transferred. Any larger estate or amount of interest, subsequently acquired, would not have passed to the purchaser. So here, there being only an equitable interest, no more than an equitable interest was transferred. The Sheriff's title is gained by *seizure*. It thence seems to us to follow, that whatever estate or interest the defendant then has in the thing seized, and no more, can be disposed of by him.

We may mention that we have referred to the cases of *Smallcomb* v. *Cross*, 1 Ld. Ray. 252, *Payne* v. *Drewe*, 4 East 538, *Woodland* v. *Fuller*, 11 Ad. and El. 866, and *Right d. Jeffreys* v. *Bucknell*, 2 B. and Ad. 282; which, so far as they go, support the opinions here given. On neither of the main questions, however, determined by us, have we been able to find any decision.

LOW v. FOSS.

The Chief Justice delivered judgment in this case as follows:—

[illegible], for negligence and unskilfulness in the treatment of a wound. The declaration stated, that at the request of the defendant, the plaintiff retained and employed the defendant, "*as a surgeon and apothecary*, the said defendant then carrying on the profession and business of surgeon and apothecary," for fees and reward to be therefore paid to the defendant. It alleged, that the defendant entered on such retainer and employment, "*as such surgeon and apothecary*"—but that he neglected to use proper skill, &c.

To this, among other pleas, the defendant pleaded, that at the time when, &c. he was *not carrying on the profession or business of a surgeon*:—whereupon the plaintiff demurred, on the ground that the plea raises an immaterial issue. It was contended that the plea was good, on the ground that, although an action for negligence would lie, where the employment was without reward, or where the defendant was not a surgeon, yet in these cases the *degree of negligence* necessary to maintain the action was different; and, therefore, that it was material to have it ascertained, on the record, whether the defendant really carried on the business of a surgeon or not. To this it was answered, that the duty charged in the declaration equally attached, without regard to the determination of that fact, one way or the other. The Court inclined to the opinion, on the argument, that the plea was bad; but, at the request of the defendant, allowed the case to stand for consideration.

The contract stated, is one of hire of service for reward; a contract by which both parties are benefitted. The defendant is liable, therefore, for ordinary negligence. But as, in the case of this contract, as stated on the record, *skill* is required, the ordinary care which is required from the defendant means, ordinary skill *in the business he is alleged to have undertaken*. But, although the business mentioned in the declaration required skill, yet if the plaintiff knew the defendant not to possess such skill, or not to profess the business of a surgeon, and that he made no pretensions to skill in surgery, then the defendant would be bound to use such skill, only, as he happened to possess.

In this case, however, the declaration states that the defendant was *retained as a surgeon*, and that he entered on, and *accepted* such retainer. By so doing, he made pretension to skill in surgery, and was, therefore, by the retainer, bound to exercise that skill. That being so, it is immaterial whether he then actually *carried on the business of a surgeon*, or not. He may, in fact, not have been a surgeon, and not have carried on the business of a surgeon. But if, as the declaration alleges, he was retained as a surgeon, and accepted that retainer, the contract for surgical skill, which is the contract relied on by the plaintiff, will be complete.

On this short ground, we think the plaintiff entitled to our judgment. The defendant may, however, if he think fit, amend; either by substituting a plea for the one now demurred to, taking issue on the *retainer as a surgeon*, or by striking out the words "*for fee or reward*," in his 3rd plea. The amendment, in either case, if made, will of course be on the usual terms, as to costs.

WOOD v. SPENCE.

This was a motion to set aside a nonsuit and obtain a new trial. The action, which was one for use and occupation, had been heard before Mr. Justice Dickinson, when the plaintiff's mother, who was called as a witness, stated that she had heard some scratching on paper, as of writing, and that immediately afterwards she head something read, which was stated to be an agreement between the parties, comprising the powers of the contract. His Honor conceived that the weight of evidence in this case went to show the existence of a written contract, and nonsuited the plaintiff; but in now delivering judgment, the Chief Justice and Mr. Justice a'Beckett were of opinion, that the witness being blind, could substantially give no proof of a written agreement having existed, and that a new trial must be granted. Mr. Justice Dickinson retained his former opinion, and went at considerable length into the reasons upon which that opinion had been formed.

DELOITTE v. WALKER.

The Chief Justice said, that the Court would be prepared to deliver judgment in the above case on Monday next.

SMITH AND ANOTHER v. SIMMONS.

This was an action by the Trustees of the insolvent estate of R. G. Dunlop against Isaac Simmons.

Messrs. Foster and Windeyer moved for a judgment, as in case of a nonsuit, upon the ground of delay in setting the cause down for trial.

Mr. Darvall opposed the motion, and produced an affidavit to the effect that delay had been occasioned by the necessity of consulting the creditors of R. G. Dunlop's estate, and that previous to receiving notice from the defendant's attorney for the present motion, notice had been given of the plaintiff's intention to apply for a commission to examine witnesses in England.

The Court was of opinion that the grounds of excuse ought to have been more fully set forth in the affidavit filed in answer to the present application, and the plaintiff was therefore directed to give a peremptory undertaking in the usual terms.

O'BRIEN AND ANOTHER v. O'BRIEN.

Mr. Windeyer moved for, and obtained, an order for judgment, as in case of a nonsuit, in the above case, upon the ground that the plaintiffs had failed to go to trial in pursuance of their peremptory undertaking.

DENT AND OTHERS v. CAMPBELL.

Mr. Broadhurst moved that the above case be tried by a special jury of twelve. Motion granted.

KEGERAN v. ROSTRON.

Mr. Michie moved, upon affidavit, for a writ of prohibition to prevent Alfred Cheeke, Esq., Commissioner of the Court of Requests, and John Kegeran, of the county of Camden, from proceeding any further in a suit which had been brought by the said John Kegeran against John Rostron, in that court, upon the ground that the subject matter of the suit was a balance of account under a special contract, involving an amount much larger than that in which the Court of Requests could have jurisdiction.

Upon reading the affidavit, however, it appeared that the contract merely referred to six bales of wool, and the Court declined to proceed in the matter until the actual value of the property was shewn, but granted a rule *nisi*.

SMITH AND ANOTHER v. SIMMONS.

This was the action in which a peremptory undertaking had been ordered to be given at an earlier period of the day, and Mr. Darvall now moved upon affidavit for a commission to examine witnesses in England, the cause of action being the sale of a vessel, which transaction had taken place in London, and could only be proved by witnesses at that place. He also moved that proceedings should be stayed until the return of the commission.

Messrs. Foster and Windeyer opposed the motion, on the ground that the case had been already greatly delayed without any satisfactory excuse for such delay being offered, and that the defendant had thereby suffered great injury—having been prevented, on one occasion, from going to England, by the plaintiffs, when he had made all his arrangements for doing so. It was also stated on affidavit that the action was not really for a sale of a vessel, but merely for an alleged breach of contract on the part of the defendant whereby the sale had not been completed; while it was sworn that the insolvent, R. G. Dunlop, with whom the contract had been made, had altogether failed to complete his part of it.

Mr. Darvall replied at some length, contending, that no delay had taken place which was not unavoidable; and that the other side had not shown the existence of any real defence on the merits.

The Court, after having taken time to consider, granted the application: but decided that the costs of such application should be paid by the plaintiffs; the costs of the commission, and of the evidence taken under it, to be costs in the cause.

BLAMEY v. MALLARD.

This was an action for assault, and Mr. Foster now moved, on the part of the defendant, that it might be tried by a jury of twelve. Mr. Windeyer, for the plaintiff, opposed the motion, on the ground that the [illegible] in support of the application had disclosed no tangible grounds for departing from the usual course.

The Chief Justice was opinion that the granting or refusal of an application of this nature rested with the discretion of the Court, and that sufficient grounds had not been shown to depart in the present case from the ordinary course. The other Judges were of opinion that the intention of the new Jury Act was merely to substitute a jury of four for a jury of twelve, when both parties were willing to have the case determined in this manner, but that they had a right to resort to the old constitutional mode of trial by a jury of twelve whenever they were desirous of doing so.

The motion was therefore granted: the costs to be costs in the cause.

JURIES.

The cases of Dacre v. Salting, and Mayne v. Turner, were respectively ordered to be tried by special juries of twelve, the motion for such juries being unopposed.

O'BRIEN v. WALKER.

Mr. Darvall moved that a rule obtained for the trial of this case by a jury of twelve, might be set aside, and that it might be tried by a jury of four. This, it appeared, was the case in which judgment as in case of a nonsuit had been granted by the Court at an earlier hour of the day, and in making this motion Mr. Darvall proceeded to contend that the former judgment had been given improvidently, inasmuch as the facts of the case, which would have varied that decision, had not been brought forward. It was by the other side, he stated, that a special Jury of twelve had been obtained, thereby rendering it impossible for the plaintiff to go to trial in proper time, while the defendant, even at the time of moving for judgment, as in case of a nonsuit, was aware of the present action being contemplated. Besides which it had been agreed between the parties that no further steps should be taken until the Court had delivered judgment in another matter between the same parties, and it was not until that morning that such judgment had been given.

Mr. Windeyer opposed the motion, contending that the order which he had already obtained in this case had been properly obtained, and could not be summarily set aside in a proceeding of this nature. The state of things assumed by his learned friend did not really exist, and was not in any matter supported by affidavit, for which reason it would be wholly irregular to prevent the defendant from obtaining any benefit which he might derive by having the order drawn up, which he had already obtained. With reference to the present application Mr. Windeyer took several objections to the wording of the notice, and produced an affidavit to the effect that the plaintiff had already set down the cause for trial by a jury of twelve, and given a peremptory undertaking to go to trial with that jury. Besides this, the rule of Court which was now sought to be set aside, had been overruled by the first clause of the Jury Act, which provided that all causes then pending should be tried by juries of four; so that the object ostensibly sought for by the other side might be attained without the intervention of the Court.

The Court decided, that this application was one, upon the whole, which the plaintiff was entitled to make; for whether the order of the Court was or was not set aside by the operation of the Act of Council, still as such an order had been granted, and as the passing of the Act rendered it impossible to proceed with the trial by a jury of twelve, the plaintiff might with propriety, come to the Court to get rid of the order altogether. The application must, therefore, be granted; the costs to be costs in the cause, but the position of the plaintiff would not be changed, for the judgment, as in case of a nonsuit, would still remain untouched.

JURIES.

A common jury of twelve was granted, with-

out opposition, in the case of Barker and others v. Holt; and special juries were granted for two cases of Blamey v. Mallard; a third action between the latter parties having been made the subject of a previous motion.

BROWN AND OTHERS v. SINGLETON.

Mr. BROADHURST moved for judgment, as in case of a nonsuit, in the above case, on the ground that the plaintiff had not proceeded to trial according to notice.

Mr. MICHIE opposed the motion, upon an affidavit that notice of trial had been given sooner than was necessary, and that the delay had been occasioned by the record being withdrawn in consequence of the absence of a material witness. He contended, therefore, that the application of the other side was premature, although it might be open to them to move for the costs of the day.

Mr. BROADHURST contended, in reply, that whether the notice was premature or not, still, as such notice had been given, the plaintiff was in a position to have judgment, as in case of nonsuit applied for, whenever he failed to comply with the terms of the notice he had thus given.

The COURT discharged the motion, upon the plaintiff giving a peremptory undertaking to go to trial at the next *nisi prius* sittings; and on the plaintiff agreeing to pay the costs of the day, the Court directed the motion to be discharged without costs.

Court adjourned till ten o'clock to-morrow (this) morning.

DOMESTIC INTELLIGENCE.

INSOLVENCY PROCEEDINGS.

MEETINGS OF CREDITORS FOR TO-DAY.

Wilson, Cozer, and Henderson, a special meeting, at ten o'clock.
John Fearnley, a special meeting, at ten.
John Martin Davis, a special meeting, at half-past ten.
Michael Gannon, an adjourned second meeting, at eleven.
Henry William Whittington, an adjourned single meeting, at two.

There are no meetings fixed for to-morrow.

MEETINGS OF CREDITORS.

The following is a list of all the meetings of creditors fixed to take place in the Office of the Chief Commissioner of Insolvent Estates, up to this date, inclusive, extracted from the Minute Book in the office of the Chief Commissioner. Note—1, 2, 3, denote first, second, and third meetings; also, *s.* a single, *sp.* a special, and *ad.* an adjourned meeting. Except where otherwise stated, meetings are to take place in Sydney :—

APRIL.—Thursday, 24.—J. H. Stead, *s.*
Friday, 25.—John Richard Rouse, *sp.*; Thos. Braidwood Wilson, 1.
Saturday, 26.—John Rankin, *s.*; Henry Perrier, *s.*
Monday, 28.—Dennis Walsh, *s.*; James Herron, *s.*
Tuesday, 29.—James Thomas Bell, 3; Christopher Flynn, 3.
Wednesday, 30.—Mary Ayling, *s.*
MAY.—Saturday, 3.—William Samuell, *sp.*
Monday, 5.—James Whittaker, *s.*; Edward Bunbury Foster, *s.*
Tuesday, 6.—Robert Crawford, 3.
Thursday, 8.—Richard Crampton, *s.*
Saturday, 10.—Thos. Braidwood Wilson, 2.
Wednesday, 14.—John Stone, *s.*
Friday, 16.—William Cummings, 3.; Thos. Cummings, 3.
Tuesday, 20.—John Carfrae, 3.; Charles John Bubb, 3.
Wednesday, 21.—Samuel Russell, *sp.*

APPLICATIONS OF INSOLVENTS FOR CERTIFICATES OF DISCHARGE.

The following is a list of all the applications for certificates of discharge, notified in the *Government Gazette*, containing the dates when the applications were notified, and when they are to be made to the Chief Commissioner :—

Name of Applicant.	Date of Application.	When Application is to be made.
William M'Niece	March 7.	April 22
George Coles Milne	March 11.	April 24
Joseph Pritchard	March 15.	April 24
Charles D. Street	March 20.	April 24
Joseph Brown	March 20.	April 24
Edward Gates	March 20.	April 24
Hercules Watt	March 21.	April 24
William Arthur Marshall	March 22.	April 24
Robert Russell	Jan. 14.	May 1
John Waite	March 19.	May 1
Peter Joseph Duffy	March 24.	May 1
Charles [illegible]	March 24.	May 1
[illegible] A. Vaillant	March 27.	May 8
John Loveridge	April 3.	May 8
George Rowley	April 2.	May 8
Owen M'Mahon	April 5.	May 8
Thomas Woodhouse	April 7.	May 8
Arthur Joseph Maister	April 5.	May 8
Thomas Plows	April 4.	May 15
Martin Dewin Cooper	April 4.	May 15
Charles Weavers	April 9.	May 15
Jordan Sparks	April 9.	May 15
Kenneth Munro	April 9.	May 15
James Ferguson	April 9.	May 15
William Matthew	April 9.	May 15
Lawrence Foley	April 9.	May 15
Quinten Valentine Swift	April 10.	May 22
Joseph Howard	April 11.	May 22
Thomas Chaplin Briellat	April 16.	May 22
David Rebeiro Furtado	April 16.	May 22

NEW INSOLVENT.—The following estate was sequestrated yesterday: Frederick Anslow Thompson, of Pitt-street, Sydney, grazier. Debts, 218 18s.. Assets—personal property, £50; bad and doubtful debts, £150. Balance deficiency, £4168 10s.—Clark Irving, Official Assignee.

VAN DIEMEN'S LAND.

THE following correspondence, caused by the assumption by Dr. Willson of the title of Bishop of Hobart Town, appears in the *Launceston Examiner*, and will be found well worthy of perusal :—

Longford, October 8, 1844.

Right Rev. Sir,—A copy of a document has been placed in my hands purporting to be an address presented to the "Right Rev. Father in God, the Bishop of Hobart Town."

I am also told that the address was received by you, under the above designation, on Monday, the 30th ultimo.

May I take the liberty of asking you whether I am correctly informed, that you have thus assumed the title of "Bishop of Hobart Town;" and, if this be the case, may I beg to know, under what authority you lay claim to the possession of a see, established within the limits of Her Majesty's dominions, by a power independent of herself; and with what legal right you take up a title derived from the metropolis of that diocese which Her Majesty, in the exercise of her royal privileges, has been pleased, by letters patent, to commit to my immediate guardianship?

You will not, I should hope, so far misunderstand the motive of this application as to ascribe to a captious desire to interfere with the ministration of others, a line of conduct which proceeds from a conscientious regard to the duty which I owe to my sovereign and to my church, as well as to the obligations imposed upon me by the oaths which I have taken.—I have the honour to be, right rev. sir, your faithful and obedient servant,

Signed F. R. TASMANIA.
The Right Rev. Dr. Willson, &c., &c., &c.

Hobart Town, October 14, 1844.

My Lord,—Courtesy dictates that I should thus address you, and I do so most willingly.

In reference to your letter of the 8th instant, I have to state, that as I do not recognise in you any right whatever, either civil or ecclesiastical, to put to me the questions you have, I at once decline giving you any reply.

Your rude and perfectly unprovoked attack upon me and the ancient church of which I am unworthily a bishop, (if your words were correctly reported in the *Hobart Town Courier*, 25th July), and the violence of your language in the lectures given in St. David's Church, have determined me never to enter upon a subject with you that could by possibility give rise to a controversy.

We are placed here by the government, if I understand our duty rightly, for a purpose very different from that of religious strife and contention, at all times unprofitable, but with you and me, in this land of woe, positively disgraceful, and in my humble judgment, fraught with danger.

Thousands of our respective flocks are festering in misery, and crying from their prison house for spiritual aid and consolation. Contend with whom you will, my lord, you shall not contend with me.

Your gratuitous insults and provocations of myself and flock would have been passed over in silence had you not addressed me now.

My lord, you evidently mistake your position in this colony—do not allow indiscretion to usurp the place of becoming zeal. Your are placed as the head of the Protestant Church in this island—be satisfied with your elevation—adhere to your own duties, if you would be respected—interfere not with others.

Believe me, we have both of us an awful task to fulfil, and an awful responsibility to sustain. We may be, by heaven's blessing, of much service to the *imprisoned*, to the colonists in general, and to our most gracious Queen, provided we discharge our sacred duties faithfully, with meekness, charity, and Christian energy; but if our time and strength were spent in wrangling and strife, we should only be as "men beating the air," ay, even as "the raging waves of the sea foaming out their own shame."—St. Jude.

My lord, enforce the doctrines of your own church with all the energy you please; your zeal would be commendable, and your motives duly appreciated by all prudent and good men; but pause before you indulge in violent invective against any class of Christians, lest you should err in your judgment and draw upon yourself the pity or the censure of your own friends.

Every man who has truly the welfare of this most important colony at heart will strive his utmost to cherish a spirit of peace, concord, and friendly feeling in all classes of society. If that be neglected, a very few years may fatally prove that every indiscreet and violent partizan has been an enemy to this land, and a bad subject of his Sovereign.—I have the honour to be, my lord, your humble and faithful servant,

+ ROBERT WILLIAM HOBARTIEN.
The Right Rev. the Bishop of Tasmania, &c., &c., &c.

Longford, October 18, 1844.

Right Reverend Sir,—Had your reply to my letter of the 18th instant, been confined to a simple refusal to accede to my request, to know whether I had done you an injustice in concluding that you had assumed the title of "Bishop of Hobart Town," I should not have thought it needful to continue a correspondence which cannot be agreeable to either party. Your signature and seal would have been sufficient evidence of the assumption to which I allude, and I should not have troubled you with any further remarks, by letter. But, the peculiar (and I must be bold enough to say, uncalled for) tone in which you have thought proper to address me, demands some few reluctant comments at my hands.

Bearing in mind, that all desire to interfere with your ministrations, as far as they are lawful, has been distinctly disclaimed by me,—and that my application to you avowedly rested upon the obligations imposed upon me by my oath, as a bishop of the Anglican Church,—I cannot but express my deep regret upon finding both my words and motives so manifestly, and (forgive me if I add,) so angrily misconstrued.

You will suffer me, perhaps, sir, to explain these motives more fully; not as though I were upon my defence, but, as one who humbly conceives that he has the privilege, both by civil and ecclesiastical right, to consider himself as the lawful,—the only lawful bishop of or in this diocese.

You are, sir, I apprehend, aware, that the oath of supremacy (which every Protestant subject must take before entering upon any office of high trust, whether in church or state), declares that "no foreign prince, person, prelate, state or potentate, hath, or ought to have, any jurisdiction, power, superiority, pre-eminence or authority, ecclesiastical or spiritual, within the realm of England." It follows, as a necessary consequence, that all those who have taken this oath solemnly swear that the Roman pontiff neither has, *de jure*, nor ought to have, *de facto*, the authority to erect and confer ecclesiastical dignities within the dominions of her Majesty. Yet, the (so called) bishopric of Hobart Town is thus established within these dominions, by a foreign power or prelate; for I am not aware that the appointment emanates from the sovereign. The deduction is sufficiently obvious. Such a creation, or establishment, is contrary to English law, and involves a direct violation of the rule laid down by the oath of supremacy.

You deny my right to question this appointment. With all humility, as conscious of my own demerits, but with all firmness, as conscious of the real privileges in my position, I claim this right.

Her Majesty, by her letters patent, has been pleased to "ordain, make, constitue, and declare" the island of Van Diemen's Land and its dependencies to be "the diocese of the Bishop of Tasmania." That diocese she has been further pleased, by the same instrument, to confide to me, whom she has thus constituted the guardian of all spiritual rights connected with it. It believe, sir, that I do you no wrong in expressing my belief, that you have no such authority; but that your position emanates from another and a foreign power, which we, upon oath, repudiate. I wish to say nothing at present of the uncatholic proceeding of a bishop assuming his title from the chief city of a diocese already filled by another; but I am compelled to observe, that, as long as I continue in my present office, I have no choice. I must either, it appears to me, break my oath, violate the laws which I have sworn to obey, abandon the real position to which the Sovereign has appointed me, or else protest against the establishment and occupancy of another see within my own diocese. I was unwilling to make any such protest as long as I could, conscientiously, avoid it:—as long that is, as I was allowed to look upon you as Bishop Willson, not as Bishop of Hobart Town.

If my right, civil and ecclesiastical, to act as I have done, and still must do, be denied by yourself, as the head of the Church of Rome in this colony, I humbly conceive that you must deny also the prerogative of the Sovereign with reference to the exclusive right to establish bishoprics within her dominions—you must deny my own position, through her, as the lawful bishop of this diocese—you must deny that I am a true bishop of the Church of Christ.

I am painfully aware, Sir, that however anxiously I may strive to avoid giving personal offence to yourself, individually, or to your flock, generally,—however guarded may be my words—I can scarcely hope that you will receive the assurance of my having acted, not from hasty zeal, but from conscientious and prayerful consideration. I am the more compelled to entertain this belief, in consequence of your declaration, that I have "evidently mistaken my position in this colony." Pardon me if I express my humble, yet strong belief, that the careful wording of my letters patent renders such a mistake almost impossible. My position—my jurisdiction—my authority,—nay (if it be a matter worth speaking of) my very title—are all so explicitly therein laid down, as to require nothing to be conceded to me on the score of courtesy. I can assume no more than her Majesty has been pleased to assign to me: it seems to me that it would be practically slighting the commands of my royal mistress were I to be content with less.

Excuse me if, with reference to your position in this colony, I plead entire ignorance of that which is implied, if not expressed in the following sentence of your letter:—"We are placed here by the Government, &c." I was not, and am not, aware, that you are, or have been, so placed. I have not been informed that you are recognised, either by Lord Stanley or by the local government, as the Bishop of Hobart Town (the position which you have assumed), although I am aware that you are regarded as standing at the head of all in communion with the Church of Rome in this colony. Indeed, such a recognition is impossible, until our government shall have formally conceded to the Roman pontiff the right of exercising ecclesiastical jurisdiction within her Majesty's dominions, to the same extent, and upon the same footing, with herself.

Holding, then, the conviction upon this subject that I have now expressed, no other course is open to me but one similar to that adopted by the Bishop of Australia: even as he felt himself bound to protest against the establishment of an archbishopric within his diocese, or within the dominions of our sovereign, by a foreign power, so must I feel it also to be my duty to make the like protest, when I find myself placed in the like position.

But there are other portions of your letter which were I to pass by altogether unnoticed, might seem to imply, on my part, a tacit admission that they were correct and just. You charged me with "rude and perfectly unprovoked attacks upon you and upon the ancient church" of which you are a bishop. I can but express my confidence that the charge is groundless. I must be allowed to state my belief that we live in days when, if conscientious members of the church of England venture to speak their minds respecting the church of Rome, their honesty of speech is too often magnified into personal and unprovoked attacks. For myself, I cannot but disclaim all idea or intention of personality; though I hold myself free to comment on the language or conduct of public men, so long as I adhere to the rigid bounds of christian truth and a becoming tone of speech,—provided that I bring no "railing accusation," but state my convictions with simple straightforward honesty.

You further speak of my "violence of language in the lectures delivered at St. David's Church;" of my "gratuitous insults and provocations" of yourself and flock; and of my "violent invectives"—referring, I presume, to the class of Christians to which you belong. I must beg leave to deny the accuracy of any of these assertions; and to disclaim insult, provocation, violence, and invective. I can only regret that you have been misinformed as to the real character of my language, and have been betrayed into the use of expressions, which assuredly I shall not imitate, and which you yourself, I am willing to believe, have, long ere this, lamented. That earnestness in the performance of that which I look upon as my duty,—that zeal in contending for what I conscientiously believe to be the faith once delivered to the saints,—that a desire to place in their true light, positions which my vows bid me consider erroneous,—that all this may appear to engender religious strife and contention in the sight of either zealous members of your communion or of ill-informed members of our own faith, I can readily believe. That the step which I have taken in publicly preaching upon the points at issue between the Churches of England and of Rome should not meet with the approval of such persons, I was prepared to expect. I do not affect to court their commendations; and assuredly, I do not heed either their misrepresentations or their censure.—I stand upon my ordination and my consecration vows: I seek to make no converts amongst those of another faith; nor do I attempt to entice them to be present at our public services. But—if I have any reason to believe that some of my own flock are induced to listen to the exposition of doctrines and tenets, against which the Chuch of England still continues to protest, as irreconcilable with her views of christianity, then am I, in my humble judgment, neglectful of my duty—nay, then am I forsworn; if through false delicacy or false fear I abstain from lifting up a warning voice, and from openly proclaiming that which my conviction and my vows unite in regarding as the truth.

It may appear to some as "positively disgraceful" to moot these points in this unhappy land. The worldly wise may deem it injudicious; the indifferent may consider it uncalled for, or ill-timed; the mere politician may condemn it as inexpedient. It is not with me a question of judgment or of expediency, but one of principle; and I am satisfied to execute what I conscientiously believe to be my public duty, even though I may have done some violence to my private feelings, which would never of themselves lead me to indulge in controversy.

If, in the execution of this painful task, I am so unfortunate as to "draw down upon myself the pity or the censure of my friends," I can but commit my cause to Him who judgeth righteously; I can but pray (as I do most earnestly) that if unwittingly I be in error, He, of His infinite mercy, may pardon me the wrong, and forbid my mistaken efforts to serve Him to prevail.

I know not, sir, whether you will care to accept my parting assurance, that however I may and must publicly dissent from the position that you have now assumed, I have no disposition to regard you, privately, with any other feelings than those of friendliness and goodwill; and I may surely be allowed to pray that you, and I, and all, who love, serve, and fear our Heavenly Father, may be, hereafter, permitted to meet in that blessed place, where the wicked cease from troubling, and the weary are at rest, [illegible] will be removed, and ourselves, we may humbly hope, be allowed to rejoice as we behold the several branches of the Christian world swallowed up in the universal dominion of our common Lord.—I have the honour to be, sir, your faithful and obedient servant,

(Signed) F. R. TASMANIA.

I have taken the liberty of transmitting a letter to you, which has been forwarded to me at Longford. I presume that it is meant to be consigned to your hands.

Hobart Town, October 24, 1844.

My Lord,—I have the honor to acknowledge the receipt of your letter of the 18th instant.

As this letter contains nothing that would induce me to alter a single opinion expressed in my last communication with you, but rather much to confirm me in the justice of my remarks, and as I have before stated that I shall not enter into controversy, I beg leave, with all due respect, to decline making, at present, any comments upon it.

For your courtesy in forwarding to me the letter, which had been sent by mistake to Longford, I wish to express my best thanks.—I have the honour to be, my Lord, your humble and obedient servant,

+ R. W. WILLSON, HOBARTIEN.
The Right Rev. Dr. Nixon, Bishop of Tasmania, &c., &c.

MULTUM IN PARVO.

(From late Australasian Papers.)

THE Bank of South Australia, and the Adelaide branch of the Bank of Australasia, have reduced the interest on deposits to two per cent.—The premises of Murray, Greig, and Co., Hindley-street, Adelaide, 80 feet frontage by 90 to 100 feet back, brought at public auction £992, *cash*. Mr. Featherstone bought the shop frontage and entrance, 45 feet, for £662, and Messrs. Flett and Linklater the remaining 35 feet for £330; showing the cash value of the frontages to be about £10 per foot—at the rate of £5000 per acre—which is nearly as high as it ever has been.—On Saturday, March 29th, Wira Maldira, one of the Lake Victoria tribe of natives, was executed in front of the gaol, Adelaide, in conformity with his sentence at the late sessions, for the murder of George M'Grath, in June, 1844.—A South Australian branch of the British and Foreign Bible Society was formed at Adelaide on the 24th of March, of which his Excellency Governor Grey is president.—The contract for building the jetty at Portland has been obtained by Mr Scott, the ship-builder, for £1280.—Great complaints are made in Van Diemen's Land in consequence of the English banks there not reducing their discounts to the rate charged in Sydney.—The Roman Catholic Bishop in Van Diemen's Land has put forward an earnest appeal to the members of his church for assistance towards providing for the maintenance of some Sisters of Charity who are to be sent from this colony.—There is a great want of rain in Van Diemen's Land.—A great portion of the tallow produced at the boiling-down establishment of the Messrs. Henty, at Portland Bay, is sent to England *via* Launceston.—The Government has determined to deprive the inhabitants of Launceston of the old race-course, the only place of recreation they possess. It is to be fenced in, and occupied as a garden for convicts.—Fielding Browne, Esq., is gazetted judge, and Alban Charles Stoner, Esq., crown prosecutor, of Norfolk Island.—One hundred persons left Launceston, in one day, as passengers by the *Swan* and *Minerva*, for Port Phillip and Portland Bay.—Mr. T. Y. Lowes sold 4000 sheep at the Cross Marsh, near Launceston: the prices realised were full 25 per cent. more than have been obtained for some time back.—A match came off on the course at Hobart Town, on the 5th instant, for a hundred guineas a side, between Mr. Dry's Colonel and Mr. Stevenson's Whalebone; distance two miles: Colonel beat easily.

RETURN CRICKET MATCH.

YESTERDAY the return cricket match, between the Currency and Union Cricket Clubs, came off on the Hyde Park cricket ground, when it was won easily by the former, with ten wickets to go down.

The umpires were—for the Currency Club, H. Cunningham; for the Union Club, R. Driver.

The following is the score :—

UNION.—FIRST INNINGS.

Weakes, b. by W. Tunks	1
J. Deane, b. by W. Tunks	1
W. Lane, b. by W. Tunks	3
W. Roberts, b. by H. M'Kone	27
E. Laycock, b by W. Tunks	1
T. Weedon, b. by H. M'Kone	7
T. Jaques, b. by W. Tunks	1
W. Roberts, (2) b. by H. M'Kone	0
W. Crane, not out	2
W. Deane, b. by H. M'Kone	1
R. Weston, b. by W. Tunks	11
Byes	2
	57

SECOND INNINGS.

Weakes, b. by W. Tunks	2
J. Deane, b. by H. M'Kone	1
W. Lane, b. by W. Tunks	9
W. Roberts, b. by W. Tunks	4
E. Laycock, b by H. M'Kone	0
T. Weedon, b. by H. M'Kone	17
T. Jaques, c. by Sly	6
W. Roberts, c. by Hillier	0
W. Crane, c. by H. M'Kone	13
W. Deane, not out	6
R. Weston, b. by W. Tunks	0
Total Second Innings	53
" First Innings	57
Grand Total	110

CURRENCY CLUB.—FIRST INNINGS.

J. Tunks, b. by Lane	20
H. Hillier, b. by Weedon	33
C. Pashfield, b by Lane	10
H. M'Kone, b. by Weedon	17
J. Sly, c. by W. Roberts (2)	4
W. Tunks, b. by Lane	0
E. Holland, run out	2
J. Hillier, not out	8
J. White, b. by Weedon	0
J. Pashfield, b. by Weedon	3
J. Jones, b. by Weedon	0
Byes	1
No Ball	1
	89

SECOND INNINGS.

E. Holland, not out	6
J. Hillier, not out	17
Total Second Innings	23
" First Innings	89
Grand Total	112

ABSTRACT OF SALES BY AUCTION. THIS DAY.

MR. BLACKMAN.—At his Rooms, at 11 o'clock, Chinese Goods, Olive Oil, Kangaroo-skins, Lace Goods, and Cabinet-ware.
MR. MARJORIBANKS.—At the Albion Wharf, at 12 o'clock, the Schooner *Beppo*.
MR. SALAMON.—On the premises, Lower George-street, the Lease, Good-will, Fixtures, &c., of the Liverpool Arms, Tavern.
MR. MORT.—At the Stables of Messrs. Jones and Dixon (late Webb's), Horses.

COLONIAL DISTILLATION.—For some eight or ten days past, rumours have been rife that His Excellency the Governor has been in possession of information, inculpating sundry of the officers appointed by him specially to watch over the proceedings of colonial distilleries—information which left no doubt that extensive frauds had been perpetrated—and in the perpetration had been winked at by some of the officers alluded to. The whole matter is now in the hands of the Attorney-General. It is said that on Friday last one of the officers tendered his resignation, but that it was refused by the Governor, who will have the matter fully investigated. The circumstances, which are now the topic of very general conversation are, that a lady's carriage was used for the purpose of conveyance of quantities of spirits—the lady herself guarding the treasure—and that there is an account-book showing various items of tip, all and sundry, as disbursed by the author of the "wicked willany" to those whom he had bought over. Many, too, are the candidates for the situations which are to vacated, but nothing has elapsed as to any appointment even *pro tem.*

COURT OF REQUESTS.—The new sitting of the Court of Requests in the district of Sydney for the current quarter, commenced yesterday in the Court of Requests Court Room, Bent-street, with a list of 121 causes for sums between £10 and £30. The Court adjourned at five o'clock, till ten to-day, when No. 42 will be the first case called on.

RESPITE.—The man Hogan, who was sentenced to death at the recent Assizes at Bathurst, for murder, has been respited. It has not been made known to what extent the commuted sentence is to go.

WATER POLICE.—For a long time past the members of this force have been very abstemious in filing informations; yesterday there was one to be heard—and this is only a forerunner of what will be done if masters of vessels are not cautious to act up to the letter of the Rules lately promulgated, and which are to take effect after the 25th instant.

DELAY OF THE BUSINESS AT THE POLICE COURT.—For some time past, the public have been subjected to very serious inconvenience by the delays which take place in the Police Court. Scarce a day has passed, during the last five or six weeks, without one, two, or three adjournments. Generally, each of these is announced to take place for five minutes; and if this period of time was strictly adhered to there would be little cause of complaint: it is not the number so much as the duration of these adjournments that requires reprobation, as instanced yesterday in the following manner:—The Mayor opened the Court at nine, A.M., and sat till twelve minutes past ten, when the Court was adjourned for five minutes, but that five minutes did not expire till eight minutes to eleven, when Mr. Stirling took his seat, and sat for twenty minutes, when another adjournment for five minutes took place, but the Court remained closed till seventeen minutes past twelve, when it was re-opened before Colonel Shadforth and Mr. L. Myles: the Mayor and Mr. Windeyer soon after also appeared on the bench. The total number of cases for hearing on the lists were—sixteen drunkards, ten summons cases, and twenty-two general charges. Of these, only the drunkards, and three of the charges on the general list, had been disposed of previous to Colonel Shadforth taking his seat on the bench, thus leaving twenty-nine of the longest cases to be disposed of after seventeen minutes past twelve; the Court having, from its opening at nine, A.M., till its re-opening at seventeen minutes past twelve, been open for only one hour and thirty-two minutes; while it had been closed, instead of ten minutes, for not less than one hour and forty-five minutes. The Court again adjourned at a quarter to two, till half-past two, when a few cases were disposed of; and at the final adjournment for the day, at half-past three, nine of the summons cases, and two of those on the general list, which had not been entered upon, were called over and postponed till to-day.

COMMITTAL FOR FORGERY.—Edward Bartlett, who had been in custody for ten days on a charge of forgery, and committed to take his trial on Friday last, was yesterday again brought up before the Mayor and Colonel Shadforth, and informed that he would be admitted to bail, himself in £100, and two sureties in £50 each. The forgery was alleged to have been committed by indorsing the name of C. C. Boyd, Esq., on a promissory note, payable three months after date, and purporting to have been drawn by Mr. Warland, in favour of the prisoner. The signature of Mr. Warland was also sworn to be a forgery. The case was involved in considerable difficulty, as the document, although seen by Mr. Boyd, Mr. Spyer, and another party, could not be produced in Court; no one knew what had come of it, although £12 had been at one time advanced on the faith of its being a genuine document, and exhibited as such to Mr. Spyer.

ST. VINCENT ELECTION.—The *Atlas* of Saturday contains a report of Mr. Lowe's speech at Braidwood on Tuesday last, which we give below. It will be seen that it contains even an extra dose of personal antipathy and bitterness:—"Gentlemen, electors of the counties of St. Vincent and Auckland, I am so fully aware of the important business which requires your attention this day, that I will study to be as brief as possible in returning you my cordial and heartfelt thanks for the honour which you have just done me. I am, as has been truly said by one of my calumniators, a stranger to this county, not possessing a foot of land, or a head of stock within it; I cannot, therefore, attribute the warmth of your reception to any personal feeling towards myself, but rather to approbation of those principles of justice and freedom of which I am the advocate. Had any gentleman of your county, possessing the requisite knowledge, and enabled to devote that knowledge to your service, come forward, I should not have been here to-day; but I make no apology for being so, because I am persuaded that in the crisis at which we are arrived, it is far more necessary that you should elect persons able to devote all their time to your service, than those who possess accurate local knowledge. We are now arrived at a great crisis: two roads are before us; the one will lead us to a higher and more durable prosperity than we have ever enjoyed, the other to still increasing misery and calamity, till we are blotted out of the list of colonies, like the unhappy islands of New Zealand and Van Diemen's Land, by the misgovernment of the Colonial Office. For myself, gentlemen, I have nothing to hope from a seat in the Council; it will not add anything to the very moderate income I derive from my profession; but I desire it, because I wish to save you, or, at least, to endeavour to do so, from the ruin with which you are threatened by the Executive Government. When I entered the Council as a Nominee of the Crown, I considered that I had undertaken a trust for the benefit of the people, for the faithful execution of which I was answerable to God and man, and I foolishly believed, on so discharging it, I should be carrying out the wishes of the Government which sent me there. Such a novice was I in Colonial government, that I actually believed the interests of the Crown coincident with that of the people. The only apology which I can make for this error, is the ignorance which then generally prevailed concerning most questions at issue between this colony and the Mother-country: but, gentlemen, when I found the Governor, by a stroke of his pen, in defiance of the unanimous remonstrances of the country, and of the lessons of reason and experience, bent upon annihilating the pastoral interests of the colony, I was undeceived—I could not support that Goverment. When I saw a system of district taxation introduced and persevered in, after remonstrances from the Council, in which I had the honour to bear a part both by speech and vote, and introduced not, as I believe, for the sake of the mockery of self-government, under which their destructive nature was concealed, but for the sake of fastening more firmly on the colony the enormous annual expenditure of ninety thousand a-year for police and jails, and of taxing the land already sold—God knows how dearly!—for the purpose of making the remainder saleable by the erection of roads and bridges—I would not, I could not support that Government. While they were playing this disgraceful thimble-rig—while they were shifting this infamous imposition from the ordinary revenue to the local taxation, I would not play the part of a confederate, and wink and connive at this disgraceful trickery. When the Government, straining to the utmost that prerogative, which is only entrusted to the Crown for the good of the people, levied upon the grantees of land, much of which had been dearly earned by naval and military service, the accumulated arrears of Quit-rent, which it was well understood would never be demanded, with an extortionate cruelty at which the harshest private creditor would blush, every feeling of justice and humanity revolted at it; and I could not support that Government. When I found that an enormous expenditure, utterly disproportionate to the means and wants of the colony, instituted for bribing voters in England, at our expense by sinecure or half sinecure offices denounced by the Council, denounced by the Judges of the land, and defended by none but its recipients and their hangers on, was to be perpetuated: I could not support that Government. It has been said of me, and repeated time after time with a disgraceful pertinacity, notwithstanding my repeated and public contradictions, that I entered the Council pledged to the Governor. Gentlemen, had I done so, had I been capable of accepting a trust for your benefit, and delegating the exercise of that trust to another, I should be unworthy to stand before you as your representative this day; but it was not so; and when I resigned my seat it was not because I was pledged, but because I would not give any one the opportunity of taunting me with employing a power I derived from the Governor systematically to thwart his measures. As to your local matters, gentlemen, I will endeavour, by making the tour of the county before I return to Sydney, to make myself better acquainted with them. I shall be very grateful for any information which any of you may at any time communicate to me on the subject; at the same time, great as the claims of your district are on the ground of former neglect, I can, I fear, do but little for you. It is a penalty which must be paid by those who return members to represent the *colony*, that they will receive little in the way of patronage from the *Government*. Hope nothing from this Governor, his whole attention is taken up by scraping together by every discreditable expedient, a revenue which, being emancipated from the control of the Representatives of the people, may serve the purposes of the Colonial Office. For you he cares nothing, and will do nothing. Gentlemen, the sorrow which I feel in taking leave of you, is considerably alleviated by the reflection that I shall probably very shortly come here again on the same errand. The differences between the Governor and the Council are concentrated, are brought to a point; each party thoroughly understands where and why they disagree, and collision has become unavoidable and even desirable. Fire and gunpowder, the moment before their meeting, do not more certainly portend an explosion than the day which shall once more place the Governor and the Council face to face. Whether he will shrink from the conflict, and seek some other land which, though he cannot find as flourishing, he may render as wretched as this, or whether he will dissolve the Council, and thus give the constituencies a chance of riveting their own fetters, I do not know; but, in the mean time, your eye will be upon me, and if the latter event happens, as I rather think it will, you will, I trust, see no reason to give me a reception less cordial than that with which you have honoured me to-day."

COMMITTAL.—John Conway, a free man, late a hired servant in the Forbes Hotel, King and York streets, was yesterday committed to take his trial for stealing a great coat, value £3, the property of Mr. John Collins, book-keeper, in the employ of Messrs. Pite and Preston. The prosecutor stated that the coat in question had been lost for three or four months; that he had most probably left it in the house where the prisoner was serving; he recognised the coat in the possession of a person on Saturday last, who informed him he had purchased it at public auction, in Mr Heydon's sale room, about the 17th instant. Mr. Heydon recognised the coat as one which had been left with him by the prisoner for sale on or about the 25th February; an advance of two shillings was made on it, and a like sum was subsequently advanced. Mr. Heydon knowing that the prisoner had been employed as a servant for a considerable time in the Forbes Hotel, in his (Heydon's) neighbourhood, had no suspicion of its not being the prisoner's property. The prisoner in defence alleged that he had received the coat in question from his late employer, for the purpose of enquiring after an owner, which, after every exertion, he had failed to discover; and as his master had given up the business he thought he was doing nothing wrong by disposing of it. Mr. Martin was called, and considered that it was probable he had handed over the coat to the prisoner for the purpose of enquiring after the owner, but he certainly gave him no permission to convert it to his own use. After committal the prisoner was allowed bail, himself in £80 and two sureties in £40 each.

STEALING FROM A SHOP WINDOW.—About a quarter to nine o'clock yesterday morning, while the family of Mr. Hart, draper, George street South, were at breakfast, a pane of glass in the shop window was broken, and three valentia waistcoats, value 15s. carried off.

CHARGE OF PERJURY.—For several days past the Police Court has been more or less engaged in hearing evidence in support of a charge of perjury preferred against Henry Wineberg, publican, by Aaron Gainsborg, late a publican, but now residing on the Parramatta-road. The perjury was alleged to have been committed by the defendant swearing that he had been assaulted by the prosecutor, on the Parramatta-road, between the hours of ten and eleven on the forenoon of the 9th of March. After the case had been closed for the prosecution, the Mayor stated that he had given the case every consideration in his power, and that, as he did not see that there was a *prima facie* case made out, he must dismiss the case. The defendant was thereupon discharged, and his bail cancelled.

GUANO.—CAPE OF GOOD HOPE.—It appears that the supply of Guano, which had hitherto been ample at Ichaboe, has altogether failed, in consequence of the vast number of vessels that had gone there to fill for home. In the meantime a similar deposit has been discovered in various localities within the jurisdiction of the Government of the Cape of Good Hope. The Government there issued on the 31st December last a proclamation, however, that no persons shall be allowed to remove Guano, unless licensed by one or other of a number of officers named to do so, and on payment of a fee; thus rendering Guano a source of revenue, which if any should in ringe the conditions of the proclamation, he or they will be liable to severe punishment. The *South African Commercial Advertiser*, of the 5th February, 1845, says:—"*Guano—Ichaboe, Malagas.*—By late accounts from Ichaboe it appears that there are generally about four hundred vessels at anchor around that rock, loading or waiting their turn to load with guano. Vessels, however, are constantly leaving as well as arriving in ballast, as it is now clear that all cannot be supplied in any reasonable time, if at all. Some on arrival, seeing the hopeless state of the case, have merely requested from Captain Brooke, of the *Thunderbolt*, a certificate of their having been there, for the satisfaction of their owners, and returned to England as they came. In a short time, therefore, Malagas, (Saldanha Bay,) will be the chief redezvous for these fleets, where, by the exertions and prudent foresight of an indefatigable Executive, due preparation has been made by the erection of stages for loading a hundred ships at a time, and by every other arrangement that zeal for the public service could suggest. It is by taking time by the forelock that the present Government of the Cape is so advantageously contrasted with all that have preceded it."

Mr. Salamon will sell by auction, this day, on the premises, the lease, good-will, bar-fittings, fixtures, &c., of the Liverpool Arms Tavern, Lower George-street, for which no doubt there will be great competition, as from its celebrity as a ready money business, as well as the extent and respectability of its connection, it is one of the most desirable opportunities of this nature that has for some time presented itself.—*Communicated.*

MR. MORT'S HORSE SALE, THIS DAY.—We are requested to call the attention of the public to the alteration of the place of sale of the horse stock, in the estate of the late Mr. Richard Webb, as shewn in the advertisement,—having been previously advertised for sale at the Cattle Market, but will be held at the stables of Messrs. Jones and Dixon, York-street, opposite the Market Place, in lieu thereof, and at eleven o'clock this day.

THE AUSTRALIAN COLONIES.—Commerce is reported to be improving in Sydney, where flocks of sheep and wools had been sold at improving prices. When they hear of the rise in England, and the general prosperity of the clothing trade, there will no doubt be a much greater advance. The lawyers in the colonies have followed the example of the Irish attorney-general, and have done even better for the interests of the profession. The Solicitor-General of New Zealand had been killed in a duel, and the Solicitor-General of Van Dieman's Land had been dismissed from his office for a similar offence, thus making two official vacancies. The latter gentleman is asserted to have fought his way up at the colonial bar, he has now fought it down again. Correspondents of the Sydney papers complain with reason of the defenceless state of that city. The Pacific, it is observed, no longer deserves its name, it is becoming the rendezvous of hostile squadrons, and the scene of quarrels. The French have there a powerful squadron with several war steamers. The Americans no less than ten sail, of which three are large frigates. The British ships on the New South Wales station are only *two corvettes!* the *North Star* and the *Hazard*, and not a single battery, not even the semblance of a fortification protects the emporium of British commerce in the southern hemisphere. If, say these writers, the French were to proceed as they have done at Tahiti, they might take a position off the city, and levy a ransom of a couple of hundred thousand pounds to preserve it from destruction. We do not believe that in case of such a hostile visit a ransom would be accepted. The French would prefer the plunder of a wealthy city for which they would not be required to render a very exact account, and they would not forget that the destruction of Sydney would be a heavy and permanent blow to British commerce. The Sydney papers say, that the formation of their harbour is such as to make effectual fortification easy, and that they have plenty of heavy guns and convict labour to spare. We are not friendly to expensive fortifications for outposts and naval stations, thinking that they rarely repay the cost of maintaining, much less of erecting them. But Sydney is just one of those places which ought to be protected. The capital of a valuable and rising colony ought not to be exposed to a *coup de main*, and ought also to afford protection to British trading vessels in time of war. Sydney, Hobart Town, Port Essington, and one good harbour in New Zealand, ought to be put into a proper state of defence in such times as these, when a single false step may lead to a general war. The southern colonies would then have sufficient protection against a predatory squadron, and be able to shelter merchant vessels whilst waiting for convoy. These colonies will soon have a British population sufficiently numerous to make a regular attack hopeless, but it ought not to be left in the power of a few fast-sailing cruizers to insult, and perhaps to destroy, the most flourishing of our settlements, in the occasional absence of a naval force sufficient for its protection.—*Calcutta Englishman, November 13.*

COPYRIGHT OF SERMONS.—A practice has recently arisen of taking down in short-hand the sermons of first-rate preachers, and of forthwith printing and publishing them for the pecuniary benefit of the person by whom the short-hand writer is employed. We are asked whether the preacher can check the practice by any proceedings in the courts of law or equity? In other words whether such an act as we have mentioned amounts to an act of piracy? The two main principles upon which copyright depends are these:—First, that it is originally a species of property; secondly, that it does not pass to other hands by the act of publication. There can be no doubt that a sermon, like a poem, a treatise, a history, or any other manuscript, is the fruit of a man's own labour; that up to the time of delivery it is his own property; and that until that time it is subject to his exclusive disposal. Thus, there can be no doubt that the first of the two principles of copyright is applicable to a sermon. The difficulty of the question, such as it is, will be found to arise upon the second of these principles. The delivery of a sermon from a pulpit amounts to a publication. The hearer listens for his own instruction, pleasure, and improvement. For the same objects he may reduce the whole to writing; but it does not therefore follow that he may print and publish it for his pecuniary benefit. We see nothing in the relation of the preacher to his congregation which can sanction such a step. His duty is to teach and to instruct, to point out religious duty, to persuade his congregation to be zealous in discharge of it; but not to make them a present of an essay which they may publish with a profit.—*Law Magazine.*

CAUTION TO APPRENTICES.—James Heany, fifteen years and a-half old, under indentures as an apprentice for eight years (five and a-half of which are unexpired) to Mr. Joseph Sly, upholsterer and cabinet-maker, Pitt-street, was brought up at the Police Court, yesterday, before Messrs. Stirling and Campbell, charged with absconding from his indented service. The indentures being put in and proved, Mr. Isaac Nichols, inspector of the Water Police, proved that on Saturday last he took the prisoner by warrant, from on board the *Australian* whaler, then about to proceed to sea, he having previously been entered as a sailor on the books of the said vessel. The prisoner made no defence, and as it appeared by his indentures that the present was the third time he had been before the Court for a similar offence, he was sentenced to be confined in the cells for three days, and fed on bread and water during such confinement.

STEALING FROM AN AUCTION ROOM.—About eleven o'clock on Saturday evening, Mr. John Wood, auctioneer, King-street, gave a man named William Price, in custody to constable Johnstone, for stealing three shirts and a handkerchief from his premises: the property was found in the prisoner's possession. It was also proved that the prisoner had taken the bundle from a window on Mr. Wood's premises. The prisoner (a freed man) was yesterday committed to take his trial.

ORIGINAL CORRESPONDENCE.

To the Editors of the Sydney Morning Herald.

GENTLEMEN,—There is nothing of more universal lamentation among men and even women at present, than the badness of the times and although one must concur in the expression of popular opinion as to the comparatively depressed state of the money market, and the consequent torpidity of business, yet it occurs to me upon full and deliberate reflection, that there exists abundant cause for thankfulness rather than complaint, and gratitude rather than a petulant expression of dissatisfaction. Certainly there are no immense fortunes to be acquired now as formerly, by a *coup de main*,—300 or 400 per cent. to be gained. No retiring from business after a few years' application with thirty or forty thousand in Bank. No! these things have become as it were mere matters of history among us (evidencing only the folly of the earlier times of the colony)—and avarice, the bane, in my opinion, of our rising interests—must be content to pursue steadily the legitimate objects of a business, yielding the smallest possible remunerating returns, or waste itself in idle regrets upon the inordinate wealth that has been acquired, but which is now no longer to be similarly realized. And although every age and country must possess a few of those fortunate individuals, whose least step and endeavour leads to a further acquisition of wealth—seeming themselves to possess the attributes of the philosopher's stone that transmutes all substances into gold—yet the time has arrived, when even a competency must be secured by a long and uniform course of diligence—and diligence seconded and assisted by at least moderate economy. And such a course I most emphatically assert will never be found inadequate in securing a due portion of worldly possessions, *as bad as times are*.

If it were possible to analyse the real characters of those who are everlastingly lamenting the inferiority of the present in respect to former times, I might with great pretension to truth assert, that grasping avarice and whining discontentment form very predominant features in their disposition. And who, upon an impartial consideration of facts, who in rigid justice can complain, except indeed those *lordly oligarchs* of Australia, who have been for years past battening in the profusion of extravagant luxuries; but who in the plentitude of their all-grasping dispositions, finding their means of wanton enjoyment curtailed, give vent to their remembrance of the past in miserable calumniations of the present? I say, again, who in rigid justice can complain, except indeed these, and their despicable coterie? None! Are not the necessaries of life in abundance? Are they not to be procured in abundance? Does contented industry find any difficulty in obtaining even more than a comfortable subsistence? The answer to these queries is palpable, and requires no comment.

What man in possession of even ordinary faculies, but ought to have seen the ultimate consequence of such inordinate cupidity—of such extravagant mania for landed purchases and possessions—of such disposition to show, equipage, and princely luxury, as the phases of colonial society very recently exhibited. The consequence is so tangible, that unless we draw the conclusion that men never reflected at all, we are in a labyrinth;—for, surely, with such a consequence staring them in the face, their actions would have savoured less of the extravaganza—their desires would have been more moderate—and their ardent thirst for princely inordinate wealth abated by the serious danger it seemed to involve. The *datum*, then, upon which we must reason, is, that men never reflected at all. Never reflected what must be the ultimate consequence of such greedy, unmeaning speculation—that it not only comprehended their own destruction as individuals, but when generally followed, exposed to fearful and immediate peril the welfare of a community at large—such has been the consequence! And now, finding their ill-concerted schemes frustrated—their avarice, their ambition, and their arrogance miserably disappointed—ruined in extravagant hopes—broken in fortunes—they look upon themselves, in the fulness of their complacency, as martyrs in a noble cause—victims of unmerited misfortune! and ascribe the whole amount of their distresses to nothing but the rigours of a destiny, relentless and irresistible; dreaming not that their own hasty and oft-repeated indiscretions occupy a prominent station in the origin of their woes. Some there certainly are (and I grieve to say it) who have been victims of misplaced confidence—meriting not by any conduct of their own, other than fond and ill-advised dependance, the serious calamities that have befallen them. These are to be pitied!—pitied, not only because the guileless and unsuspecting are generally the most amiable men, but because the sanctity of full and perfect confidence should never be violated, and the schemes of designing villany should never triumph over the fondness of unsuspecting innocence. Let such mark a more careful demeanor for the time to come.

I will not attempt to deny that great and serious embarrassments have reached us. Any one who has been resident in the colony for a series of years must necessarily bear witness to the fact, that New South Wales has been flagging in the grand onward march which characterised her earlier history. This is quite apparent—and the question now arises, "how far our recent difficulties may exert an evil influence over the future destinies of the colony." I, for my part, cannot be led to think deplorably of any of the much-talked-of calamities that have hitherto befallen us—nay, rather than indulge in gloomy apprehensions, I dare foretel an early and glorious advent of brighter and better times, when the full tide of returning prospects shall be among us. And encouraging a further spirit of prophecy, I augur the most extensive advantages (under the blessing of Providence) from our recent misfortunes, in further developing the inherent resources of this mighty colony—giving zeal and direction to individual enterprize, pointing our exertions to the only true means of enriching ourselves, founding our views and opinions on a more enlarged and judicious system of commerce, and above all, teaching us that the only plausible and legitimate mode of succeeding in worldly prosperity is, not by dangerous and overweening speculation, but by a slow, steady, and well-arranged system of business, in which common sense is the first ingredient. Much they have already done for us—affording us an ordeal whereby dishonesty and evil machination have been unveiled to the eyes of the community, and whereby men of real substance and legitimate pretensions to wealth have become known, to the utter and signal discomfiture of the man of straw, and of him, who has virtually no claim whatever to rank, station, or affluence.

I have the honour to be, Gentlemen,
Your very obedient servant,
AN AUSTRALIAN.

Sydney, April 18, 1845.

NEWS FROM THE INTERIOR.

(From our Correspondent.)

WINDSOR.

On Tuesday last, the 15th instant, thirty-three publicans' general licenses, one wine and beer license, and two confectioners' licenses were granted for this district, namely, for the town of Windsor, sixteen; Richmond, seven; Wilberforce, four; Pitt Town, one; Richmond road, two; Kurrajong, one; Windsor road, two general and one wine and beer; one confectioner's license for Windsor, and one for Richmond.

At the Police Office on Saturday last, the case Regina *v.* Hough, was heard before R. Fitzgerald and J. L. Scarville, Esqrs., when the prisoner was committed for trial for stabbing Daniel Toohil, with intent to do him some grevious bodily harm. An outline of the case appeared in the *Herald* of the 12th instant, in which it may be remembered it was stated that Hough stabbed Toohil at the Catholic Chapel, immediately after Divine Service. This statement was fully borne out by the evidence. The instrument used was a large clasp knife, which, fortunately for Toohil, struck against one of his ribs and glanced off, causing only a superficial wound, from which he has perfectly recovered. The unfortunate prisoner, who appears to be upwards of sixty years of age, seemed perfectly collected and sane when at the bar, and acknowledged stabbing, or as he called it, jobbing, Toohil once. He is considered by all who know him to be insane, although it is quite apparent he has lucid intervals.

On the same day, John Usher was charged with stealing a watch from the residence of Mr. Thomas Freeman, publican, of this town. The only particular feature in this case was the peculiar circumstances under which the robbery was discovered. It appears that on Saturday, the 12th instant, a man named M'Ginnis was proceeding along the Richmond road, when the prisoner, who was in a helpless state of intoxication, galloped by him, and after riding about one hundred yards past him, fell off his horse, which continued its course. M'Ginnis noticing that he did not rise, went to assist him, and finding he could not recover him, carried him to the side of the road and took from him two silver watches, a silver watch-case, some money, and memoranda, which he delivered to the Chief Constable, who immediately sent one of the force to convey Usher to the lock-up. During the day, it appears Mr. Freeman had seen the prisoner in the town, and in the evening he missed his watch from the bar, where it always hung, upon which he sent a description of the watch and information of the robbery to the police, and it was there ascertained that one of the watches found upon the prisoner was the one lost by Mr. Freeman. The prisoner was remanded

During the night of Saturday the long-wished-for rain at last commenced, and continued, with little intermission, during the whole of Sunday. It was much needed, not only for the wheat but also for the grass, as feed was beginning to get scarce, with but a slight prospect of any increase in it until the ensuing spring.

ORIGINAL CORRESPONDENCE.

To the Editors of the Sydney Morning Herald.

Gentlemen,—Being aware that the columns of your paper are always open to the expression of impartial feelings, I beg to send a few remarks with respect to the late events in the Bay of Islands, and the native inhabitants of New Zealand generally.

A great deal has been said and written lately in this colony, to show that the New Zealanders are a savage and unmerciful race of men; if we civilized Europeans do give publicity to acts which, if not properly understood, will tend to lower the New Zealanders in the estimation of every Christian nation, we are equally bound to make public all peculiarities of their character which tend also to raise them in the estimation of public opinion.

It is a well-known fact that the natives of New Zealand have been for many years past most favourably disposed towards Europeans. They have always encouraged their trade by every means in their power, and protected those who lived amongst them. Have then their feelings altered lately? Not in the least. Their hatred is against foreign authority, not against foreigners. Ever since the treaty of Waitangi, any impartial witness might have remarked a great deal of dissatisfaction amongst them; and late events show that they are now determined to get rid of government, if they can. New Zealanders are naturally proud, and if they think their rights and privileges are in the least invaded, they will fight desperately, and even loose their lives in protecting themselves. In this case their impression is, that government will ultimately make slaves of them, and they think they are fighting for their independence. It is true that the inhabitants of Kororarika have greatly suffered lately, but it was only because they were mixed up with soldiers and marines, and were made to take arms against the natives, otherwise their lives and property would have been respected; and even when the inhabitants fought against the natives, who for years had looked upon them as friends, did the latter act with treachery or cruelty? On the contrary, they acted most nobly, most magnanimously. They fought bravely on open and almost level ground, and when the power-magazine blew up, and the Europeans were left at the mercy of the natives, did the latter take advantage of that unfortunate circumstance to surround and slaughter the Europeans! No, they received Mr. Powditch, a Government interpreter, sent to them with a flag of truce, requesting a cessation of hostilities for a few hours, to allow the dead to be buried and the wounded to be attended to. The natives granted the request with pleasure.

John Heke, the great leader, is a bold but not by any means a bloodthirsty man; his object has always been to prevent a foreign flag from flying in New Zealand, but not to destroy European life or property. Had he wished to annihilate Kororarika, he might have done so months ago, when there were neither troops or men-of-war, but such was not his object. When John Heke had cut down the flag-staff the second time, the Governor having sent, two days' after, thirty men, commanded by an officer scarcely of age, John Heke laughed at the idea of thirty men being sent to oppose him, and would not degrade his name as a warrior by either fighting or injuring so few men, but said he would wait until government sent respectable forces against him: he has kept his word, and waited for the arrival of a man-of-war. How the affair has terminated you are aware. These are a few of the many acts which might be brought forward to show the native character in its true light; but they are sufficient to show that the New Zealanders have already attained a certain degree of civilisation.

It is now to be hoped that the interest of the European inhabitants, as well as that of the natives, will induce government to act promptly, firmly, and, at the same time, mercifully, towards New Zealanders; for if a war of extermination is carried out, it is difficult to say what the result may be, but certain it is, that New Zealand will not be a flourishing colony for many years to come.

I am, Gentlemen,
Your obedient servant,
PHILO TANGATA MAORI.

EXCHANGE.

To the Editors of the Sydney Morning Herald.

Gentlemen,—When I look back to the month of February, when the English Banks were selling their bills on London at 6 per cent. discount, and buying at 7½ per cent. discount, I am somewhat surprised to find that, within the short space of two months, the same Banks should have raised the exchange to par in selling, and to 1½ per cent. discount in buying, with the prospect of a further advance as the season wears on.

As a producer of some extent, and one whom this "*Jim Crow*" raising and depressing the exchange has affected somewhat heavily of late, I am induced to enquire into the cause which operates so destructively to the well-being of the producing portion of our community.

If we refer to the pages of your *Herald*, we shall find it asserted by a "*Suffering Squatter*," on whose authority we can rely, that these very Banks were in receipt of instructions from their Directors in London to reduce the exchange on bills drawn against wool, oil, and tallow to 10 per cent. discount during the season at which those articles are generally shipped. Now, supposing that our export from 1st December to 30th June would amount to £800,000, which I think it will during this season, is it not perfectly monstrous for institutions, which ought to have our welfare at heart, to take *one-tenth* of all our produce, or £80,000! within seven months? Of what consists their reserve funds, pray? Plunder say I, direct and indirect. An exchange between this and London, and then at London, and so on at Hobart Town, Launceston, Melbourne, &c. Our produce and our money must equally pay a toll to the English capitalist, whose nominees sit in their parlour in Old Bond-street, and dictate the terms on which we are to ship our wool. They have, however, fortunately for the producers, (for I suspect they will not be in a hurry to try the trick again,) miserably failed in their attempt; and the evil which they had threatened to bring upon us, has recoiled upon themselves with a force such as they will not soon forget.

But while the Banks must have lost more than they have gained during this season, it is but a small consolation to a man who happened to come within their clutches during that 7 per cent. fling. I happened to be one of those unfortunate men, and having to export upwards of £4000 worth of my own wool, they had very nearly caught me with a loss of £280, which I escaped to a certain extent by consigning through a mercantile house at 6 per cent., or £240.

SETTLER.

[The English Banks, in our opinion, committed a great blunder in playing with the exchanges as they have done; but to talk of "plunder" is nonsense. What pity have merchants or millers on the community, when by raising or lowering the price of wheat or sugar they can answer their own ends? What we really want are some men of large capital, as merchants, instead of men most of whom are entirely dependent upon the Banks for their capital; and then such fluctuations could not be effected.—Eds.]

GOVERNMENT GAZETTE.

FRIDAY, APRIL 18, 1845.

LAND SALE.

At eleven o'clock of Wednesday, the 14th May, the following portions of Crown lands will be offered for sale by public auction, at the Colonial Treasury, in Sydney, at the upset price affixed to each lot respectively. Deposit 10 per cent.

SUBURBAN LOTS.

Northumberland.—1. 21 acres, 2 roods, and 32 perches, Dempsey's Island, near Newcastle, No. 14. 2. 16 acres and 2 roods, same place, No. 23. 3. 20 acres, same place, No 24. 4. 22 acres, same place, No 25. 5. 20 acres, Moscheto Island, near Newcastle, No. 23. 6. 19 acres and 2 roods, same place, No. 24. 7. 8. 20 acres each, Nos. 25 and 26. Upset price £1 per acre.

Macquarie.—9. 1 acre and 34 perches, near the town of Port Macquarie, No. 2 of section 36. 10. 1 acre, 1 rood, and 17 perches, same place, No. 3 of section 36 Upset price, £4 per acre.

St. Vincent.—11. 46 acres, near Currowon, commencing at the Currowon Creek, No. 1. 12. 50 acres, same place, No. 2. 13. 17 acres, same place, commencing at the Clyde River, No. 3. 14. 40 acres, same place. 15. 42 acres, same place. Upset price, £1 per acre.

SPECIAL COUNTRY LOT.

Cumberland.—16. 9 acres, parish of St. George, portion No. 49. Upset price, £1 10s. per acre.

COUNTRY LOTS.

Gloucester.—17. 50 acres, parish of Tomaree, at Salamander Bay, Port Stephens. 18. 30 acres, same place. Upset price, £1 per acre.

LAND SALE.

At eleven o'clock of Thursday, the 15th of May, the following Town Allotments of Land will be offered for sale by public auction, at the Colonial Treasury, in Sydney, at the upset price affixed to each lot respectively. Deposit 10 per cent.

TOWN ALLOTMENTS.

Carcar.—1—4. 2 roods each, Nos. 3—6 of section 18. Upset price £8 per acre.

Parramatta.—5. 1 rood and 27 perches, No. 50 of section 26. 6. 1 rood and 28 perches, No 51 of section 26. Upset price £25 per acre.

Bathurst.—7—15. 2 roods each, Nos. 1—8 of section 34, and No. 11 of section 31. Upset price, £8 per acre.

Mudgee.—16. 2 roods, No. 1 of section 10. Upset price £8 per acre.

Hartley.—17. 34 perches, No. 11 of section 9. 28. 3 roods and 19 perches, No. 7 of section 9. 29. 1 rood and 11 perches, No. 8 of section 10. 30. 1 rood and 15 perches, No 4 of section 14. 31. 1 rood and 29 perches, No. 5 of section 14. Upset price £8 per acre.

Newcastle.—18. 46 perches, No. 224. 19—21. 36 perches each. Nos. 225—27. Upset price £50 per acre.

Raymond Terrace.—22—27. 2 roods each, Nos. 1—6 of section 16. Upset price £8 per acre.

OCCUPATION LICENSES.

At 11 o'clock, of Thursday, the 24th of April, the Colonial Treasurer will put up to auction at the Colonial Treasury, in Sydney, the Licenses to occupy, under the regulations of 21st August, 1841, the following portions of land, for one year, from the 1st May, 1845. Further information respecting the land may be obtained from the Surveyor-General; and respecting the conditions from the Colonial Treasurer. The upset price of each lot is £5 per section of 640 acres:—

Brisbane.—1. 1200 acres, at the confluence of Page's Creek with the Hunter River.

Durham.—2, 3. 640 acres each, at Bell's Creek, near Moonam

Murray.—4—6 640 acres each, at Merrigan.

Camden.—7. 640 acres. at Nattai River. 8. 0 acres, near Bimlow, Burragorang.

Georgiana.—9. 700 acres, near Copperhania. 16. 640 acres, near Burrangylong, at the Long Swamp.

St. Vincent.—10. 700 acres, at Conjurong Lake. 14. 640 acres, near Jembaicumbene. 15. 800 acres, near Broulee

Cook.—11. 100 acres, at Codumba.

Bathurst.—12. 1000 acres, near Boorowa. 13. 640 acres, near Wangoola.

King.—17. 640 acres, two miles south of Kembea.

Phillip.—18. 700 acres, at Tombong Swamp, Cudgegong River, commencing on the Cudgegong River at the south-east corner of E. Cox's 709 acres. 19. 800 acres, at Widdin Creek. 20. 640 acres, near Peddai, near the head of Spring Creek. 21. 640 acres, near Dummer's Flat.

OCCUPATION LICENSES.

At eleven o'clock of Thursday, the 22nd of May, will be put up to auction, at the Police Office, Bathurst, the Licenses to occupy the following portions of Land, for one year, from the 1st June, 1845. Further information respecting the land may be obtained from the Surveyor-General; and respecting the conditions from the Colonial Treasurer, and at the Police Office of the district. The upset price of each lot is £5 per section of 640 acres.

Bathurst.—1. 640 acres, at Caloola, Dunn's Plains.

Roxburgh.—2. 1015 acres, at Capertee; commencing at the north-east corner of John M'Lean's 300 acres grant at Worrangee. 3, 4. 640 acres each, near Capertee.

OCCUPATION LICENSES.

At eleven o'clock of Thursday, the 22nd of May, the Colonial Treasurer will put up to Auction, at the Colonial Treasury in Sydney, the licenses to occupy, under the regulations of 21st August, 1841, the following portions of land, for one year, from the 1st June, 1845. Further information respecting the land may be obtained from the Surveyor-General, and respecting the conditions from the Colonial Treasurer. The upset price of each lot is £5 per section of 640 acres.

Georgiana.—1. 800 acres, at the Grove, Burrangylong Creek. 2. 640 acres, near Bigga, at the head of Kangaroo Creek. 3, 4. 640 acres each, parish unnamed, near Bigga.

King.—5. 800 acres, at Cullavin, at the head of Cullavin Creek. 6. 800 acres, at the head of the Lachlan. 7. 700 acres, at Jerrara. 14. 1150 acres, at Nelanglo, near the confluence of Nelanglo Creek with the Yass River.

Hunter.—8. 700 acres, near the Mellong Swamp.

Northumberland.—9. 650 acres, at Newport, Lake Macquarie.

Murray.—10. 1270 acres, at Jinglemoney, Shoalhaven River.

Phillip.—11. 100 acres, Nullo Mountains, at the head of Widden Creek.

Durham.—12. 1200 acres, near the head of Dry Creek. 18. 640 acres, one mile north of the confluence of Coorangoola Creek with Dry Creek.

OCCUPATION LICENSES.

At eleven o'clock, of Thursday, the 22nd May, will be put up to Auction, at the Police Office, Port Macquarie, the Licenses to occupy the following portions of Land, for one year, from the 1st June, 1845. Further information respecting the land may be obtained from the Surveyor-General; and respecting the conditions from the Colonial Treasury, and at the Police Office of the district. The upset price of each lot is £5 per section of 640 acres.

Macquarie.—1. 640 acres, at Rollen's Plains, near the head of Bril Bril Brook. 2. 737 acres, on the Manning River, commencing from the north-east corner, being the south-east corner of Guilding's 2560 acres, on the left bank of the Kingston branch.

DIED.

April 20th, Tom, infant son of Mr. Joseph Farmer, Pitt-street.

Printed and Published by Charles Kemp *and* John Fairfax, *at the* Morning Herald *Printing Office, Lower George-street, Sydney, New South Wales, Tuesday, April 22, 1845.*

SUPPLEMENT TO THE SYDNEY MORNING HERALD.

FIRST SHEET.] TUESDAY, APRIL 22, 1845. [TO SUBSCRIBERS—GRATIS.

LAW INTELLIGENCE.

SUPREME COURT.

NISI PRIUS SITTINGS.

THURSDAY, MARCH 27.

BEFORE His Honor Mr. Justice DICKINSON.

THE BANK OF AUSTRALASIA v. THOMAS CHAPLIN BREILLAT, CHAIRMAN OF THE BANK OF AUSTRALIA.

THE trial of the above cause having been specially fixed for this day, the Court almost immediately after its opening (at ten o'clock,) was crowded with spectators, among whom might be distinguished nearly all the principal mercantile gentlemen of the Australian metropolis.

Counsel for the plaintiffs, the SOLICITOR-GENERAL, Mr. FOSTER, and Mr. BROADHURST; Attorneys, Messrs. Minithorpe, Gurner, and Tompson.

Counsel for the defendant, Messrs. WINDEYER, DARVALL, FISHER, and LOWE; Attorney, Mr. R. J. Want.

The Clerk of the Court having risen for the purpose of calling over the list of special jurymen who had been summoned to attend for the trial of this cause,

Mr. WINDEYER said, that before the case was proceeded with, he should wish to see the general list of jurors from which the present panel had been taken.

The list was produced by His Honor's direction, and handed to Mr. Windeyer, who next expressed a wish to see the list of those gentlemen who had been summoned on the present occasion. This request was also acceded to.

Mr. WINDEYER now said, that he had an objection to take which he would state at the present time, in order to prevent the possibility of its being afterwards urged that he was too late; although he had little doubt that it would be sufficient for him to urge this objection after all the jurymen had been called over. The point which he would now raise, therefore, was, that the Sheriff had omitted three or four names which appeared in the jury-book among the names of the jurors who had been summoned; whereas that officer was bound to summon the jurors indiscriminately, in the same order as their names appeared in the original list contained in such book.

The SOLICITOR-GENERAL objected to the point being raised at the present time, as there was nothing before the Court upon which it could be based.

Mr. WINDEYER submitted that the original jury list, upon which his objection was founded, was properly before the Court.

His HONOR inquired how the Court was to be made acquainted judicially with the fact forming the groundwork of the objection?

Mr. WINDEYER stated, that having been refused copies of the original list, and of the list of those jurors who had been summoned, they had had no opportunity of preparing affidavits in support of the objection now taken: for it was only on comparing the two documents which had been just handed to him (Mr. Windeyer), under the direction of the Court, that the groundwork of the objection was made apparent. For the satisfaction of the Court, however, he would at once prove the identity of the two documents in question.

After some further discussion, Mr. Cornelius Prout, the Under Sheriff, was called, and stated in reply to questions from Mr. WINDEYER, that the documents produced were the original jury list, and the list of of the gentlemen who had been summoned on the present panel; he added, however, that the *venire* issued with reference to this cause having directed in the usual form that none should be summoned who were of kin to the Bank of Australasia, or to Thomas Chaplin Briellat, the defendant, such gentlemen as were shareholders in the Bank of Australia were not summoned.

Mr. WINDEYER inquired (interjectionally) whether a shareholder in the Bank of Australia could be considered as "of kin" to the defendant, and whether the Under Sheriff could prove the parties not summoned to be really shareholders.

The names of the jurors summoned were then called over, and the following gentlemen not answering were severally fined £5 for non-attendance, viz.:—Thomas Howe, Esq., of Campbelltown; William Howe, Esq., Junior, of Glenlee, Campbelltown; John G. Hand, Esq., of Penrith; J. T. Hilley, Esq., of Sydney; George Hill, Esq., J.P., of the Surry Hills, Sydney; John Holt, Esq., J.P., of George-street, Sydney; and Edward Flood, Esq., J.P., of the Surry Hills, Sydney.

Twenty-four names of those gentlemen who had answered having been again called over,

The SOLICITOR-GENERAL objected to J. M. Gosling, Esq., as being a shareholder in the Bank of Australia.

Mr. WINDEYER remarked, that the fact of Mr. Gosling being really a shareholder must in the first instance be proved.

The SOLICITOR-GENERAL then produced the list of shareholders filed in the Supreme Court, wherein Mr. Gosling's name as a shareholder appeared; and Mr. WINDEYER said that he had no objection to admit the identity of the Mr. Gosling summoned as a Juror with the gentleman whose name appeared on the list. The SOLICITOR-GENERAL, however, preferred that Mr. Gosling should be personally examined, and that gentleman having been called and sworn, he stated that he was a shareholder in the Bank of Australia, and had been so for some time past.

Mr. Gosling's name was then struck out, and another juryman was called in his place.

Mr. WINDEYER now placed upon the file a challenge to the array, in the following terms:—

"In the Supreme Court of New South
"Wales, the 27th day of March, A.D.
"1845.
"The Bank of Australasia, plaintiff; and Thomas Chaplin Breillat, Chairman, &c., Defendant.

"And now on this day, to wit, on the twenty-seventh day of March, in the year of our Lord one thousand eight hundred and forty-five, come, as well the plaintiff as the defendant, by their respective attorneys aforesaid; and the Jurors of the Jury empanelled also come; and hereupon the defendant challengeth the array of the said panel, because he saith that the Sheriff has improperly omitted to summon certain Jurors, to wit—one John Gilchrist, of George-street, Sydney, Esq., J.P.; and one Matthew Smith Finlay, of Surry Hills, Sydney, merchant; and one Dugald Graham, of O'Connell-street, Sydney merchant; and one William Hamilton Hart, of Liverpool-street, Sydney, Esq., J.P.; and one John Hollingworth, of Surry Hills, Sydney, Esq., J.P.; who respectively ought to have been summoned according to law, and whose names were in due order in the jurors'-book to be summoned on the trial of this case, and that the Sheriff has, in the place of these jurors, who ought to have been summoned, but were not, summoned certain jurors who ought not to have been summoned on the trial of this cause, and this the defendant is ready to verify, whereupon he prayeth judgment, and that the said panel may be granted." In support of this course, the learned gentleman drew the attention of His Honor to the passage relative to the challenge generally, in Dickenson's Quarter Sessions, which (he remarked) went much more fully into the subject than Archbold.

His HONOR inquired of the Solicitor-General whether he intended to plead or demur to this challenge.

The SOLICITOR-GENERAL expressed his intention to plead, and shortly afterwards the following plea was filed:—

"And the plaintiffs, protesting that the said challenge is wholly bad and insufficient in law; nevertheless, by way of counter-plea thereto, say that the said Sheriff did not improperly omit to summon the said Jurors into the said challenge named, nor did the said Sheriff summon Jurors who ought not to have been summoned, in manner and form as in the said challenge is alleged, and of this the plaintiffs pray that it may be inquired into as the Court may direct."

The defendant's Counsel filed a replication to the above plea, consisting simply (in addition to the formal heading) of the words, "And the defendant doth the like."

The SOLICITOR-GENERAL called the attention of His Honor to the fact, that the plea not only acted as a reply to the challenge, but questioned its sufficiency in law.

His HONOR said, that he could not receive the plea in the double character of a plea and of a protest, but must in the present case regard it wholly in the former light, and as it rested with him to determine the course to be pursued for deciding this point, he should choose for that purpose two gentlemen, unconnected with either of the parties, from among those then in Court.

Several gentlemen having been spoken to, who excused themselves upon the ground of being shareholders in the Bank of Australia or witnesses in the case, or of having had some previous connexion with the parties,

Messrs. John Thacker and Acton Sillitoe were placed in the jury-box for the purpose of trying the question then at issue.

Mr. WINDEYER said, that he should not detain the Court and the gentlemen selected to try the issue, by making a long speech, as he had no doubt his learned friend on the other side would say enough for both of them. He then called,

Mr. Prout, the Under Sheriff, who stated that it was his duty in his official capacity to obey the writs of *venire* issued from the Court, and, under the direction of the Sheriff, to issue the summonses to the Jurors. He also proved the identity of the Jurors'-book, the *venire*, and the list of Jurors summoned on the present panel, all of which were placed in evidence. The witness next compared the list of Jurymen returned for the present panel, with the list of names in the Jury-book, pointing out where any instance occurred of a Juror not having been summoned, whose name stood in that part of the Jury-book from whence the names of the present panel had been taken. The first gentleman who had in this manner been omitted to be summoned was Matthew Smith Finlay, merchant; and Mr. Prout stated, that he was unable to say, from his own knowledge, why a summons had not been issued for this gentleman. The next was Mr. John Gilchrist; and with reference to this gentleman, Mr. Prout stated, that he had known him for some time, and had heard him admit being a shareholder in the Bank of Australia, although he could not say when this admission was made; it was for this reason, however, that Mr. Gilchrist had not been summoned. The next name omitted was that of Dugald Graham, of O'Connell-street, Sydney, merchant; and although the witness could not positively state of his own knowledge any reason why this gentleman should not have been summoned, he pointed out a memorandum in the book, which he believed to be true, and from which it appeared that Mr. Graham had left Sydney. The next gentleman on the list was William Hamilton Hart, of Liverpool-street, Esq., who had been omitted, on account of his being the Superintendent of the Bank of Australasia. The next Juror who had been left unsummoned was Captain Hollingworth, and the reasons for omitting him were, that he had stated himself to be above the age of sixty, and thereby exempt from serving; that he had been excused from attending as Juror by order of the Chief Justice, and that (as Mr. Prout believed) he was absent from the colony. The witness stated that in these matters he had acted under the direction of the Sheriff in not summoning those whose names had been omitted, and had no communication with the attorneys on either side, relative to the matter.

Upon cross-examination by the SOLICITOR-GENERAL, Mr. Prout repeated that the omissions had been made by order of the Sheriff, but the witness believed the reasons he had already given to be those which induced the Sheriff as well as himself to think that summonses ought not to be issued for those parties, and was certain that the Sheriff as well as himself had acted, not from any feeling of partiality, but in the performance of what they conceived to be their duty. Although he was not aware of his own knowledge that any reason existed why Mr. Finlay should not have been summoned, he found in the Jury-book a memorandum, which he had no doubt was true, to the effect that that gentleman had left the country, and this he believed to be the reason why he had not been summoned. The Attorneys for both parties had applied to the Sheriff's Office for copies of the list, and had been refused. Upon re-examination, the witness stated that the refusal was by the Sheriff's order, and witness was aware that Mr. Gurner having applied to the Chief Justice upon the subject, the latter had expressed an opinion that copies ought not to be given. Mr. Kellie, whose name stood next on the panel, after the last of the omissions already spoken of, did not come there in his proper turn, some eighteen or nineteen names intervening; but witness could not state of his own knowledge how this occurred; he imagined, however, that it had arisen from this gentleman's name having been substituted for that of Capt. Hollingworth.

Mr. George Miller was then called, who stated that he knew Captain Hollingworth, and believed him still to reside at the Surry Hills, as mentioned in the Jury-book; was not aware that Captain Hollingworth had left Sydney of late for any period, having seen and spoken to him two or three times within the last eight days. Two or three weeks ago Captain Hollingworth was at witness's office.

This closed the case in support of the challenge.

The SOLICITOR-GENERAL said, that his learned friend on the other side had set out by announcing the probability that he (the Solicitor-General) would say enough for them both; and no doubt, with the kind of case he had, that gentleman had exercised a wise discretion in saying as little as possible. The challenge filed by his learned friend was not one which went to part of the Jury only, but one which would set aside the whole panel, and would be the means of occasioning great delay; and in order to bring this about, it was for the other side to make out that the Sheriff had so far disgraced himself by partiality, or was in such a position of "unindifferency" as to leave doubts of the Jury returned by him being sufficient to ensure a fair trial. If this issue should be found for the defendant, the next *venire* would have to be issued to the Coroner, as the Sheriff would be deemed incapacitated from summoning a Jury again in this cause. In the present case there was nothing in the Sheriff's position in relation to either party, which could form the ground of objection to a panel returned by him. Indeed the challenge alleged that he had "improperly" omitted from the panel some jurors who should have been summoned, and "improperly" returned others in their stead, and for the purposes of the challenge the terms "employed" must imply misconduct,—something affecting the fairness of the return. The fact that such a consequence must follow from a finding in favour of the challenge, shows in the strongest light the nature of the grounds upon which alone a party can object to the entire panel of jurors. The case, however, having now been brought under the consideration of the Court, and of the gentlemen selected to try it, they would be enabled at once to see that there was nothing in it whereon to found a belief that anything approaching to a breach of good faith had been done by the Sheriff in the summoning of this Jury, or that any grounds existed for supposing him unfit to be trusted with the duty again. The learned gentleman then proceeded to quote from Archbold, relative to the nature and effect of challenges, and particularly of challenges of the array, to which latter class (he stated) the present one belonged, being a challenge which had for its groundwork the alleged default of the officer upon whom the duty of summoning the Jury devolved. So far, however, as the evidence went, he would ask, whether there were the slightest proof that the omission of these five gentlemen, who appeared not to have been summoned, had resulted from either fear or favour, or indeed from anything else than the conscientious discharge of that duty which the Sheriff had to perform? As he had before said, it rested upon the other side to prove the existence of that partiality which was made the groundwork of the present challenge; but instead of this, the reasons which had been assigned for not summoning these gentlemen were all of them most proper ones, It appeared, indeed, that one of the five gentlemen alleged to have been unfairly omitted was exempted by age from serving on Juries at all. In the case of the *King* v. *Edmond*, reported in 4 *Barnwell and Alderson*, a question arose as to whether a gentleman who, although repeatedly summoned as a juror, had, from indisposition, never attended, ought or ought not to have been summoned, and it was expressly decided by Abbott, C.J., that the omission to summon such a person could not in any wise prejudice the defendant's case, and was therefore immaterial. That was a case which was almost parallel with that of Captain Hollinworth, and showed that in omitting him the Sheriff had done no more than was authorised by law: for if he had attended, there was no doubt that he would readily have availed himself in a case like the present, of the exemption from duty which his age would afford. He doubted not, therefore, that this challenge would prove wholly ineffectual; and regarding it as an attempt at delay, unsupported by any tangible grounds, he should not attempt to call any evidence in answer to that which they had already heard.

His HONOR, in addressing the gentlemen selected to try the points placed in issue by the challenge, stated, that the question for their determination was, whether the five individuals whose names they had heard, were properly or improperly omitted in the process by the Sheriff; and whether or not the names of five other individuals were, in the same process, improperly returned by that officer. The challenge of the array was, as had been truly stated, an objection which went to the whole panel: for it was an objection to the Sheriff's dealing, whereby this omission of certain names from the panel, which it was alleged ought to have been returned, and the insertion of certain others which it was alleged ought not to have been returned, were made the ground of a doubt as to how far the challenger under such circumstances would be likely to have a fair and impartial trial. There were two points, therefore, which must be determined: First, whether the omission of the names had been made unfairly and improperly; and, secondly, whether other names had been improperly substituted for them. From the rare occurrence of this species of challenge, and the difference of circumstances, there was no case in the books which was on all fours with the present one, as a guide to the present enquiry; but in determining whether the Sheriff had acted properly or improperly, they must look principally at the nature of the duty he was directed to perform. The duty was to summon a jury for the trial of the cause at issue between the plaintiff and the defendant, but to avoid summoning any that were "of kin" to either of those parties. He was of opinion that by this restriction the Sheriff was prohibited from summoning all parties but those who stood in a situation of perfect indifference towards either the plaintiff or defendant, and who would therefore be likely to try the cause at issue without entertaining any feelings of partiality. It was true that the words "of kin" was the only restriction precisely expressed in the writ of *venire*; but the form of these writs was very ancient, and had remained unaltered, while Joint Stock Companies were of modern growth; and it was reasonable to presume that the words "of kin" might, as respected these Companies, be construed in the manner he had already described. It was a matter beyond doubt, that five names had been omitted in the return; but it was for the gentlemen he was now addressing to say whether this had been done improperly, and to form an opinion upon the evidence which had been given upon this point. In the present case the onus of proving the impropriety fell upon the challenger, and the Sheriff was not obliged to produce evidence in order to rebut the charge which had been made against him: for it was a principle of law, that where a public officer had a particular duty to perform, he should be presumed to have done it properly until the contrary was shown. Thus, it was incumbent upon a clergyman to "read himself in," as it was termed, he would be assumed to have performed this duty until the contrary was proved. In conclusion, he would request them to take into consideration what had been urged by the learned counsel; and coupling the remarks of those gentlemen with their own observations upon the circumstances of the case, and the remarks he (the Judge) had just addressed to them, to find such a verdict upon the points in question as to them should seem best.

Messrs. Thacker and Sillitoe then retired.

Mr. WINDEYER remarked (after those gentlemen had left the Court) that he thought it right to point out the absence of any particular reference in his (the Judge's) address to the position of Kellie's name in the return, and also to state that he did not conceive the partiality of the Sheriff to be a matter in question at all.

His HONOR said, that he felt bound to leave the question in the manner he had already done, and had referred generally to the circumstances of the case; but had no objection to call the attention of the gentlemen who had just retired to the circumstances spoken of by Mr. Windeyer, if the latter desired it.

Mr. WINDEYER said, that he did not conceive it necessary; but he thought it due to his Honor to offer the remarks he had done.

Messrs. Thacker and Sillitoe, after an absence of about ten minutes, returned with a verdict that the Sheriff did not improperly omit to summon the five parties mentioned, and that the names of the other five were properly substituted.

The following Jury was then impannelled:

George Forbes (foreman), Alexander Kellie, John Rose Holden, Launcelot Iredale, Henry Ferris, Thomas Holt, Marshall Douglas Gadsden, William Hindson, William Hopkinson, John Grahame, Charles Jenkins, and James Howison.

Mr. BROADHURST then proceeded to open the pleadings. This was an action of *assumpsit*, in which the Bank of Australasia were the plaintiffs, and Thomas Chaplin Breillat, as Chairman of the Bank of Australia, was the defendant. The declaration contained seven counts. The first count was upon a promissory note for £3480 12s., dated the 7th of April, 1843, and payable at three months after date, made by one Joseph Hyde Potts, in favour of the Bank of Australia, or order; and by the said Bank endorsed to the plaintiff. The second count was upon a promissory note for £2854 0s. 10d., dated the 15th of May, 1843, and payable at one month after date, made by one Richard Dawson, in favour of one Edye Manning, or order; and by the said Edye Manning endorsed to the Bank of Australia, who had endorsed the same to the plaintiffs. The third count was upon a promissory note for £154,000, dated the 30th October, 1843, and payable on demand, with interest from the date thereof; made by the Bank of Australia in favour of the plaintiffs. The fourth count was for money lent. The fifth count for money paid to the defendant for the plaintiffs' use. The sixth count for interest. And the seventh count was a count upon the account stated. To this declaration the defendant had pleaded as follows, namely:—To the first count, that the Bank did not endorse the said note in manner and form as in the said count mentioned, that the said note was not duly presented for payment; and the said Bank had not received notice of dishonour. To the second count the defendant had pleaded in the same manner as to the first. As to the third count of the declaration, the defendant had pleaded that the Bank did not make the promissory note in that count mentioned, in manner and form, &c. And to the residue of the declaration there were pleas of payment and set off. The pleas of payment and of set off had been traversed by the plaintiffs, and issue had been joined upon all.

The SOLICITOR-GENERAL said, that the Jury had now heard the pleadings which had been opened by his friend Mr. Broadhurst, and they would be aware therefore of the great importance of the case, which they were now about to try, so far as it was rendered important on account of the large amount involved in the result. It was, indeed, the most important that had ever been brought forward in this country, not only on account of the sum at stake, but also from the influence which the result of this trial would have upon the commercial character of this country in the minds of commercial men throughout the world. The case was of such a nature that they (the Jury) had, doubtless, heard much discussion of its merits out of doors; nor were they to be blamed, for probably they could not avoid hearing much concerning it; especially when it was recollected how deeply the fortunes of many members of the community were involved in the result. He felt that it was scarcely possible they could have come into the Court without some preconceived notions respecting the case,—notions which he must believe also were unfavourable to those whom he represented this day, not because he thought there would exist the slightest disposition on the part of the Jury to countenance any injustice, or to deal with the case otherwise than in accordance with the evidence they were by their oath bound to do, but because statements had been industriously set forth by the opposite side from time to time, statements calculated to mislead the public mind, to deceive; whilst those whom he represented had preserved a total silence, thus pursuing a course much more consistent with, and likely to advance the ends of justice, than that which had been pursued by their opponents. He should show them by the clearest testimony that the statements which had been so put forth were utterly unfounded—some of them, he feared, wilfully incorrect; he should show that they were directly contrary to fact; they could only have been circulated with a view to mislead, to prepossess the mind of the public against the case of the plaintiff. He should not impute blame to any Juror that his mind should at this moment be so prepossessed: for although the statements to which he referred were professedly only addresses to the small portion of the community immediately interested, it was scarcely possible but that they had been seen, and talked of, and even discussed by others who might perchance be summoned as Jurors to try the case. He felt no doubt whatever as to the result of the trial, as the evidence was now before him; but had he thought that he needed any adventitious aid, he should rather have rejoiced than otherwise that these statements had been put forth by the opposite side, as he felt that, when their falsity was exposed, the effect would be to excite an honest indignation in the minds of the Jury, that could only be favourable to the cause of those for whom he now appeared. The subject of the present action, as had been stated by Mr. Broadhurst, was, first, a promissory note for £3480 12s., made by J. H. Potts in favour of the Bank of Australia, and endorsed by the Bank of Australia to the Bank of Australasia; second, for another promissory note for £2854 0s. 10d., made by one Dawson in favour of E. Manning—endorsed by him to the Bank of Australia, and by that Bank to the Bank of Australasia; third, for a promissory note in favour of the Bank of Australasia, made by the Chairman of the Bank of Australia, for £154,000. With respect to the two first, the defendants had had recourse to every plea which could create trouble or difficulty to the plaintiff; the endorsing was denied; it was pleaded that they had not been presented for payment when due; that due notice of dishonour had not been given. On all these points, however, the evidence which he should be able to place before the Jury would be so clear as not to admit of any doubt. With respect to the note for £154,000, which was the main subject of the present action, the only plea now on record was, that the Bank of Australia did not make the note. It had been formerly pleaded in addition that the note had been obtained by fraud, and that there was no sufficient consideration given to the Chairman of the Bank of Australia for the note. According to the rules of pleading, however, when fraud was alleged, it was necessary to specify the particulars of the fraud, and the manner in which it had been committed; and where want of consideration was pleaded, the party so pleading was compelled to specify in what the consideration failed. The defendants knew that they could specify no fraud nor point out a failure of consideration, and had not attempted to do so; and consequently on demurrer they had been disallowed. There remained now therefore only one plea—that the Bank of Australia did not make the note—and the only question for the Jury, arising on this plea, would be, whether the making of the note by Mr. Norton, as Chairman of, and for and on behalf of, the Bank of Australia, was, or was not, a making by the Bank; whether the signature of Mr. Norton, as Chairman, for and on account of the Bank, did, or did not, bind the proprietors by virtue of previous authority or subsequent adoption; and accordingly as the Jury determined this question, they would return their verdict. With respect to the other counts for money lent, money paid to the defendant's use, and for money due on account stated, it would perhaps not have been necessary to have put them on the pleadings, nor to have gone into general evidence in support of them; but since, as he had before stated, attempts had been made to mislead the public, the plaintiff had resolved to go into every circumstance, the most minute, connected with the transactions, and to lay the whole and perfect truth before the Jury for their decision. He entertained no doubt as to the result, the questions they had to try were questions of business, and he should therefore detain them only while he stated as briefly as might be those circumstances which it was necessary to detail, in order to elucidate the case which he was prepared to lay before them. The broad facts of the case were simple; before stating them, however, he would urge upon the Jury the importance of bearing constantly in mind the main facts and the leading features of the case, in order that they might be enabled to revert to them for their guidance when embarrassed by the intricacies of evidence, or by irrelevant matters, which he had no doubt they would be led into in the hope of diverting their attention from the real merits of the case. The case which they were now to try would probably be a long one; the defendants, like drowning men, would catch at every straw; and, consequently, they might expect considerable complication. He asked them then to take the broad facts—the leading features of the case—as their guide throughout the investigation—their rule in coming to their decision. It is upon them, stripped of incumbrance of detail, and undisguised by ingenuity of argument, that society at large commonly forms its judgments—so rarely erroneous upon matters of public interest; and on them will the opinion of the commercial world upon this case and on the verdict to be given be based. He assumed, of course, that he should be able to prove the case which he was about to state; but if he failed to support any of the broad facts which he should state; if he did not prove these to the satisfaction of the Jury, then let them dismiss the allegations unsupported from their consideration. If he did establish them, then, as he had before said, he entreated them to take them as their guide if any attempt were made to mislead them. The facts of the case were these: The Bank of Australia was established many years ago; and on the occasion of an increase of its capital in 1833, a new deed of partnership was entered into by the shareholders, and they became a body for the purpose of carrying on the ordinary business of banking; and they continued to carry on that business until 1843. For a considerable period they were eminently successful, declaring large dividends from profits; on one occasion, he was informed, as much as 22 per cent. on the capital invested. About the year 1840, however,—as all were sorrowfully aware,—the circumstances of the colony became materially altered, and matters grew gradually worse until perhaps after the early part of 1843, property of every description was very greatly depreciated in value, and the securities held by the Bank suffered like all others. At the commencement of 1843 the Bank of Australia had become involved to a serious amount on account of Messrs. Hughes and Hosking; these gentlemen had, as stated by the Bank Directors, overdrawn their cash account at the Bank some £60,000, and the Bank was liable for cheques, acceptances, and in other ways for £140,000 more, thus making the liability for these gentlemen £200,000. Besides this, the Bank was liable for its own notes in circulation, cash deposits, and deposits bearing interest, to the extent of £113,000 more, which might have been demanded over the counter in a single day, and the Bank, not prepared to meet more than a mere fraction of such demand, would, without assistance, have been compelled to stop. It might be that the Directors to whom the proprietors of the Bank entrusted the management of their concerns, had acted imprudently, in their transactions with this firm, that they had not exercised a judicious care for the interests of those whom they represented; but with this the present plaintiffs, who had no voice in the selection of the Directors, nor any influence in their Councils, had nothing to do. The Bank of Australia became involved in great difficulties, and was obliged to apply to the Bank of Australasia for assistance to enable it to meet its notes and other current liabilities. On the 21st February, 1843, a statement of the affairs of the Bank of Australia was placed by its Directors before the Bank of Australasia, and from this it appeared that the Bank of Australia was liable to the public, at any moment, to the extent of £113,000, in addition to the sums for which it has rendered itself liable for Hughes and Hosking; of the latter, £46,000 were acceptances by the Bank of Australia, in the possession of the Bank of Australasia before any application was made for assistance, and for which the Bank of Australia was at the time liable. A loan of £150,000 was negotiated and agreed upon, for the express purpose of enabling the Bank of Australia "to liquidate its engagements without inconvenience to the public, to give it time for the realization of its assets; and thus the Bank of Australia was enabled to get rid of a large number of creditors, who might have sued in all directions, and in exchange have only one creditor, charging the current rate of interest on the loan so granted, and willing to give them the time and accommodation which was the object of the loan. The Bank of Australia received £104,000 in cash, and their acceptances to the amount of £46,000, for which they had previously rendered themselves liable on account of Hughes and Hosking. There was no doubt that the Bank of Australasia did not make this advance altogether without a regard to its own interests: for it was represented that unless so assisted, the Bank of Australia must fail, and the greatest embarrassment must have been entailed, and the Bank of Australasia would have suffered with others; and, indeed, it is obvious that the managers of the supporting Institution, would, as trustees employed to control the affairs of others, not have been justified in rendering the assistance from the mere impulses of benevolence. The advance it was agreed should be made on the security of the bills of the Cashier of the Bank of Australia, at three months' date, and subject to renewal; and subsequently an express authority was given by a general meeting of the Proprietary, with reference to the loan, to the Chairman to give bills or other securities on behalf of the Bank. During the time that the negotiation for the loan was pending, various advances were made by the Bank of Australasia to the Bank of Australia; at one time £5000 in gold was sent, in order to prevent the Bank from being stopped by a sudden run which took place; at other times notes of the Bank of Australasia were advanced. After the loan had been formally agreed upon the amount was very soon absorbed. Meetings of the proprietors of the Bank of Australia were held at various periods subsequently during 17 months; but although the assistance rendered by the Bank of Australasia was on each occasion formally reported, there was nothing at these meetings of the repudiation now attempted; on the 16th and 29th March, 1843, on the 10th May, at the half-yearly meeting in July, at special general meetings called in the September and October following, and at the half-yearly meeting in January, 1844, there was nothing said about repudiation. During this time new Directors were chosen, and at the special general meeting in October, the proprietary recommended the appointment of certain Directors as a working-board; and the working-board appointed, and the new Directors all recognised the debt to the Bank of Australasia. In October, 1843, the Directors applied to the Bank of Australasia for twelve months further time, for a further advance of £10,000 to meet pressing liabilities, and a reduction of interest. The Bank of Australasia did not make the advance, but seeing that it was necessary that the Bank of Australia should obtain it, it consented that if any party would make the advance, it should be considered a preferent claim, and should be paid out of the first assets, and before its own claim was satisfied, and agreed to give the time required, to reduce the interest. This negotiation and arrangement were reported to the proprietors in January, 1844, and no disposition was shown to question what had been done; but on the contrary, it was approved of, and the benefits of the arrangement were accepted by the Proprietary. It was not until August last, that the proprietors misled by gross misrepresentation, after a lapse of seventeen or eighteen months, after various meetings, at which the transactions were reported, and were not disputed, but at which every act of the proprietors was consistent only with the acknowledgment and adoption of the acts of their Cashier and Chairman; it was not until the last moment that, misled, as he had stated, by gross misrepresentation, the proprietors had been led to place their character for honesty at stake, by attempting to repudiate a transaction which was entered upon for their benefit, and by which they alone had been benefitted. Every farthing of the money had been appropriated to the purposes of the proprietary; they were either now in possession of the money advanced to them, or they had been relieved by it from liabilities in every direction, upon which they might have been sued without delay. It would, perhaps, be attempted, in the defence to this action, to show that the transaction had been concocted for the relief of Hughes and Hosking; but this was false, there was never any negotiation between the two Banks with reference to Hughes and Hosking—the money was lent by the Bank of Australasia solely for the relief of the Bank of Australia—and it would be seen how much that Bank needed relief when it appeared, on their own statement, that having liabilities to the extent of £113,000, which they were liable to be called upon to meet at any moment, they had in their coffers only £4860 to meet them. True it was that a portion of the £150,000 was applied to meet certain liabilities on account of Hughes and Hosking, held by the Bank of Australasia as before stated; but these were bills for which the Bank of Australia had rendered itself liable before the loan was made; and paid off in the same way as any other liabilities by the cheques of the Cashier when the bills were presented on becoming due. It was indeed agreed at the time that the Bank of Australia, should pay off other liabilities of Hughes and Hosking held at the time by the Bank of Australasia, in addition to those for which the Bank of Australia was already liable; but after they had procured the money, the Directors of the Bank of Australia repudiated that portion of their agreement, and would meet only those for which they were before liable. The learned Solicitor here referred at length to the deed of settlement of the Bank of Australia, to show that the objects were those of a general banking company; also, to the clauses directing the method of electing a Chairman, Deputy Chairman, &c., and describing their powers. He then proceeded to argue, having shown that the authority to give bills or other securities, &c., might be vested in the Chairman, and was so vested by the deed of settlement—that the making this promissory note for £154,000 by the Chairman must be taken as a making by the Bank. It might be said that the note was larger than any that could have been contemplated, and was not such a note in fact as would have had the sanction of the proprietors; but the deed of settlement contained no clause in any way limiting the power of the Directory as to the amount for which they might issue notes, and the proprietary were therefore bound by the act of the Chairman under the authority of the Board. Moreover, it was in the very nature of the business of banking, that such an establishment should at times be subject to such a casualty as that which had befallen the Bank of Australia; the profits of banking were not made by the investment of merely the amount of paid up capital, but of deposits also of which the Banks paid a lower rate of interest than they obtained by discounting, and it was held by M'Culloch that a third or even a fourth of the amount of the liabilities was sufficient to keep in the coffers of a Bank having good credit; and if a run took place, as every banking establisment was liable to them, even the soundest institution must be ruined, unless it were able like the Bank of Australia in this case, to obtain a loan. The directors in such a case pursued the only course open to them, namely, to borrow; and it was not for the proprietors afterwards to turn round and say that they had no right to borrow. And in this case there was a direct authority to the directors, and without any limit to that authority. And not only had the directors authority to borrow, but the proprietary had actually received the money. The Bank of Australasia had no objection to the Bank of Australia repudiating their bill, if the Bank of Australia would place that of Australasia in the same position as it was before the loan was made. If they wished to repudiate that part of the loan which was applied to the payment of liabilities on account of Hughes and Hosking, then let the Bank of Australia give back the securities bearing their endorsement, and the £108,000 which they received in hard cash, and the Bank of Australasia would be satisfied. The Bank of Australasia would be placed in a much better position by getting back the £108,000 in cash and their securities, and thus having to sue for the £42,000 only, than they now were obliged to sue for the whole £150,000. If, indeed, the directors had borrowed the money for the purposes of their own; it could be shown that the money had not been applied to the purposes of the proprietary, then, indeed, there might be some excuse, some show of reason in the present attempt at repudiation; but he should be in a position to show that the money was borrowed

legitimately, that it was applied to the purposes of the Bank, that the proprietors had the money, and reaped immense advantage from it, as it enabled them to buy off liabilities for which they would have been sued in all directions. All that the Bank of Australasia wanted was to be placed in the same position as they originally were: either to be repaid their £108,000 of cash they advanced, together with the securities for the £42,000, for which the Bank of Australia was liable; or, leaving the securities, as redeemed by the Bank of Australia, to be repaid the actual amount of the loan which they now sought to recover. He had before stated that the Bank of Australasia held other paper of Hughes and Hosking's at the time the loan was contracted, besides that for which the Bank of Australia had rendered itself liable by endorsement;—for these last, which amounted to £41,000, and which were subsequently met by the Cashier's cheques, the Bank of Australia was as much liable as for their own printed notes with pictures on them, and to meet which they borrowed the money; for the others, the directors, in negotiating the loan, agreed to take them up also, but they refused afterwards to have anything to do with them. The learned Solicitor here referred at length to correspondence which had taken place between the Cashier of the Bank of Australia and the Inspector of the Bank of Australasia—in respect of the loan—setting forth the conditions on which the loan was to be granted: amongst them was a condition that a special general meeting of the proprietors should be called as early as possible; that the business of the Company, as a Banking Company, should be wound up, and that it should resolve itself into a Loan Company—the Bank of Australasia engaging to afford time, so that the Bank of Australia might be enabled to collect its assets. It was natural, said the learned Solicitor, that the Bank of Australasia, making such a large advance, at a considerable risk, should take such precautions to avoid future loss, to prevent the directors of the Bank of Australia from going on in business, which might lead to fresh embarrassments; and one of the clauses of the terms agreed upon was, that the directors of the Bank of Australia should take the liabilities of Hughes and Hosking, which had not been guaranteed by them, they taking as security a conveyance in trust of Hughes and Hosking's property, so that they might incur no further liabilities without the sanction of the Bank of Australia—and all the business to be done through the Bank of Australasia. It was only right that the Managers of the Bank of Australasia should take these precautions, they would else have been wanting in their duty to their own constituents; and it would have been well, perhaps, for the proprietors of the Bank of Australia had their directors honestly adhered to the terms. And he would ask the Jury, as men of business—of common sense, whether at the time of the transaction, they being members of such an institution, having before their eyes the dangers with which the Bank of Australia was threatened, would not gladly have acceded to such terms as those proposed? Whether, until a still darker cloud burst over the colony, and until the value of property became so much lowered that securities were valueless, they would not have rejoiced at such an offer to get rid of the difficulties of being sued in all directions, from the smallest amount in the Court of Requests, to other and higher amounts in the superior Courts? The only condition of the loan by which the Bank of Australasia attempted to benefit itself was that by which the Bank of Australia agreed to take upon itself the liabilities of Hughes and Hosking, which were not already secured by its endorsement; this condition the Bank of Australia refused afterwards to act upon; but if it had been acted upon the transaction would still have been perfectly legitimate. The Managers of the Bank of Australasia found, from the statement of the directors of the Bank of Australia, that Hughes and Hosking had overdrawn their cash account by £60,000—that the Bank of Australia was liable, by acceptancies and otherwise, for £140,000 more; and they then enquired of the directors of the Bank of Australia, what liabilities of Hughes and Hosking remained, and on being told that upon investigation they were found not to exceed £53,000 more, wisely said, "Since you have done so much for Hughes and Hosking, you had better take the whole debts, and their property also;" and at this time it could be shown, that even out of the mouths of the leading men of the Bank of Australia the property of Hughes and Hosking was valued at £600,000, far more than sufficient to meet their liabilities; so that the Bank of Australasia thus put itself into a worse position by depriving itself of the names of Hughes and Hosking, and their property, and taking in exchange the guarantee of the Bank of Australia, than it might have held. It was, indeed, supposed—and it was one of the reasons which induced the Bank of Australasia to give up the securities on the conditions they did—that a check would be put to the irregularities of those gentlemen in meeting their engagements, which was seriously felt by nearly the whole of the mercantile community; but, at the same period, no one man, no number of men, who might be called together, would have expressed an opinion doubtful of the ability of Hughes and Hosking to meet all their liabilities. Those acceptances of the Bank of Australia on account of Hughes and Hosking were paid, as he had before stated, by cheques as they became due, and these were acknowledged by the directors, and were placed to the debit account against the £150,000 advance; it did therefore appear somewhat preposterous that an attempt at repudiation should now be made. The loss to the Bank of Australasia, independently of this attempt at repudiation, in consequence of the non-fulfilment of the clause of the agreement respecting the other liabilities of Hughes and Hosking, must be taken into account. If the Bank of Australasia could have believed that the Bank of Australia would have failed to complete that agreement, the transfer of Hughes and Hosking's property would never have been sanctioned; the Bank of Australasia would have said, they owe us upwards of £40,000 we will put them into the Insolvent Court, and then we shall have an equal or proportionate share of the assets realised from their estates with you, and with the other creditors; but on the faith of the agreement, the Bank of Australasia allowed the Bank of Australia to get all the property, losing any dividend, whatever it might have been, and the Bank of Australia refused, having got the property, to fulfil the agreement. He would ask how could the Bank of Australia urge that they had received no consideration for the note of their Chairman? They were liable for their acceptances in the Bank of Australasia at the time of the negotiation for the loan: and they had had their acceptances delivered up to them, and they had had £108,000 in cash. But supposing that a portion of the consideration for the bill did not reach the proprietors, they could not say, at least under a plea that the Bank did not make the bill, that a part had been misapplied, and therefore they would repudiate the whole; as well might any body of individuals who found themselves pressed for £149,000, go borrow by their agent £150,000; and having met others charitable enough to lend £150,000, the agent, grateful for his deliverance, might give £1000 in charity, or dispose of it any other way, to testify his gratitude—as well might that body repudiate the whole transaction on account of the £1000, or £100, or £10, or a fraction of a pound. It was no ground for repudiation to allege a partial failure of consideration; but here he should be able to show that there had been no failure. Again, how were the plaintiffs to know that the defendants had not *now* their money? How can the Jury know it? The Bank of Australasia did not lend money without the expectation of there being assets to meet the claim when it should be urged. The Bank of England might be pressed; its securities might not be convertible at the moment, but they would be convertible to meet a loan at the required time; and so with the Bank of Australia, they were in possession of securities, and they might have realised them, and yet be keeping the Bank of Australasia out of the money advanced. In substance and effect, the defendants had at this moment the money of the plaintiffs in their pockets; they refused, however, to pay it, and it was for the Jury, by their verdict, to compel them to do that which was just and honest. He had before stated that the deed of settlement gave a general authority to the Chairman to sign bills, to endorse, give securities, &c.; in the present case, a special authority was first given to the Cashier, afterwards to the Chairman, H. H. Macarthur, whose acceptances, in fact, or rather renewals of the Cashier's acceptances now, were in an amalgamated form the subject of this action; another special authority having been given by the trustees, and the working Board appointed on the express recommendation of the proprietary, to give bills, securities, &c.; and moreover he should be able to show, by the dates of the meetings, and the proceedings which took place at them, that these special authorities could only have had reference to this very transaction of the loan by the Bank of Australasia to the Bank of Australia. As he had said, the Cashier (Mr. Mackenzie) was first authorised to give bills and securities; he was about to leave, and the authority was specially given to H. H. Macarthur, Esq., the then Chairman of the Company, and he renewed Mr. Mackenzie's bills; subsequently, on the appointment of Mr. Norton as Chairman, the authority was specially delegated to him; and this after the Bank of Australia had ceased to do business as a Bank, and there could consequently have been no occasion for any such power being given except with reference to this particular transaction. It was at the time of Mr. Norton's appointment and that of the working board that the application for further time, twelve months, and for the further advance of £10,000 was made, and the Bank of Australasia declined to give them in the manner proposed; but agreed to take a note for the whole amount, £150,000 and £4000 interest, made by the new Chairman, payable on demand, promising that no proceedings should be taken on the note for twelve months; and the consent was obtained to allow an advance of £10,000 to be a preferent claim over all others. This was agreed to by all the Banks; creditors of the Bank of Australia, and the Union Bank made the advance, as communicated at a meeting called shortly afterwards, by Mr. John Walker, Cashier, together with the fact that a reduction of interest had been acceded to by the Banks being creditors. On the 29th of October, authority was given to Mr. Norton, by the working board, to sign bills, &c., and on the 30th, Mr. Norton gave the bill, the main subject of the present action. Twelve months had elapsed, the Bank of Australasia had kept its agreement, and then the defence was got up which the Jury would have to decide upon. The Bank of Australasia had first Mackenzie's acceptances, then H. H. Macarthur's, and lastly, Mr. Norton's note payable on demand; and when the Bank of Australia was asked for payment, came the attempt at repudiation. The proprietary, he contended, were liable upon the note, even though the direct authority had not been given, by various acts of ratification, and adoption of the acts of their directors and working board, and of their claims since the date of the transaction; and that there had been ratification and adoption by the proprietors he should be able fully to show. It might, indeed, have been a nice question whether the whole transaction was not within the scope and authority of the directors; they were agents, but they were partners also; at all events, the proprietary at various meetings since the transaction had recognised it, and adopted it, and they were therefore liable equally as though the authority to enter upon and conclude it had been precedent to the transaction itself. It was not until the month of August in the year after the transaction took place, that any attempt was made to dispute the authority of the directors, or to repudiate the transaction, and before this there had been distinct acts of recognition at the various meetings which had been called and held, special meetings as well as those held in pursuance of the charter of the Bank. The learned Solicitor went on to argue, that from the dates of the meetings, and the business brought before the proprietary at those meetings, the resolutions authorising, first the Cashier, and then Mr. H. H. Macarthur, and then Mr. Norton, to give notes, securities, &c.; that such authority could only have reference to the liabilities incurred by the Bank of Australia, on account of the loan to it by the Bank of Australasia; the reports presented to the various meetings, which reports set out £154,000 due to the Bank of Australasia as one of the liabilities, having over and over again been unanimously adopted and approved. It was not, he said, until more than twelve months after this act had been performed, not by the old directors, but by the new directors, and by the working Board appointed by the directors at the special request of the proprietary; twelve months and more after these directors and this Board had authority and power to solicit twelve months further time for the payment of the claim of the Bank of Australasia; more than twelve months after the same directors had power and authority to negotiate a further loan of £10,000, which, through the forbearance of the Bank of Australasia, they obtained; after the proprietors had had notice that the loan had been negotiated and obtained, that they thought of repudiating the claim of the Bank of Australasia; and it would be monstrous, indeed, to suppose that such a repudiation would be allowed. Six months—twelve months elapsed, and not a word was heard of repudiation; there was time enough even for absent proprietors, proprietors in England, to have come forward and to have disputed the authority of the directors to enter into these engagements; but nothing of the sort was done—the proprietors were satisfied that the loan had been granted with a view to their advantage—that they had benefitted by it; and if they had not been misled by the false representations which were made to them, they would not, by their resolution of August last, have put their character for honesty in jeopardy as they now had—some excuse indeed there might be, insomuch as they had been misled—taking them, the proprietors, to be the real repudiators, which however he was not now prepared to admit that they were. The time did arrive, however, when those who had valued the securities of Hughes and Hosking so highly, found that they were nothing worth in proportion to the liabilities upon them; there was inevitable loss to be suffered, and thence the idea of repudiation arose. He must congratulate the proprietary, however, that their resolution of repudiation was founded in misrepresentation made by those to whom they had a right to look for information; the resolution was passed by them in the belief that they, the proprietors of the Bank of Australia, had been made a catspaw to relieve the Bank of Australasia from the debts of Hughes and Hosking. Such it would now clearly be proved was not the case. Had the directors of the Bank of Australia adhered to their agreement, had they taken upon themselves the whole of the liabilities of Hughes and Hosking, they would in all probability be in a much better position than at present. They would have had time to collect the assets, while the Bank of Australasia would have afforded them ample time to meet the heavy claim against them. By the one false step, by repudiating a part of their own engagement, they were prevented from taking the whole of Hughes and Hosking's property; other claims were left open, and parties pressed again and again until Hughes and Hosking were driven to the Insolvent Court, and the property had been fritted away until none of their claims upon it could be satisfied. The Bank of Australasia had suffered by the delay, as many parties who would have had to pay had either been drawn into the Insolvent Court in the mean time, or had been enabled to dispose of their property and to leave the country. In conclusion, he would call their attention to the leading circumstances of the case (which he recapitulated) and he begged of them to consider the effect which this case must have upon the commercial character of the country, if any body of men were to repudiate such a claim; and worse effect than all, if a Jury selected from the country, and which must be taken to represent the opinion of the country, could be found to lend its hand to such dishonesty.

[The above report of the SOLICITOR-GENERAL's address is taken from the *Sydney Morning Herald*, of Friday, March 28.]

Court adjourned at half-past five, until ten o'clock on Friday morning.

FRIDAY.—SECOND DAY.

At the opening of the Court, His HONOR said, that before the case was proceeded with, he desired to call the attention of the learned counsel to a slight omission in the report of yesterday's proceedings, which appeared in that morning's paper. The report was certainly a very excellent one, but there was a little defect in it with reference to his (the Judge's) charge upon the matter of the challenge; for when he told the gentlemen appointed to determine the question at issue, that it was their province to decide upon the propriety or impropriety of omitting the five names and substituting others in their place, he likewise told them that this question depended upon another, namely, the partiality or impartiality of the Sheriff in acting as he had done. The omission was rendered of less moment from the fact that in reporting the subsequent remarks of Mr. Windeyer, that gentleman was stated to have expressed his opinion that the partiality or impartiality of the Sheriff had nothing to do with the question, thus clearly showing that the omission of the previous allusion by him (the Judge) to the same point was the result of mistake.

Mr. WINDEYER stated, that he recollected His Honor having directed the gentlemen alluded to in the manner already described.

His HONOR then suggested the expediency in a case like the present, of taking the evidence upon each issue separately.

Mr. FOSTER said, that it was intended to adopt this course as far as practicable.

The *de bene esse* deposition of Ashton Boyce Ottley, late a clerk in the Bank of Australasia, proving the dishonour of Dawson's note, and also proving that a notice of dishonour was written and posted, was put in and read, subject to Mr. Windeyer's objection, that owing to there being no affidavit of ill health from a medical man the examination was irregular.

George Faircloth, clerk in the Bank of Australasia, was then called and examined by Mr. FOSTER: I was clerk of the Bank during the year 1843; Dawson's promissory note was in the hands of the Bank when it became due, and it appears upon the face of it to be payable at that Bank; Mr. Dawson banked there, and the day it became due I examined his account to see if there was any assets to pay, and found there were none; I know Dawson's handwriting. [The handwriting of Dawson not being denied, this line of examination was not pursued further.]

The deed of partnership of the Bank of Australia, was then put in, and the preamble of it declaring the establishment of the Bank with a capital of £120,000 was read, together with the 23rd clause, which authorised shareholders to vote by proxy; the 38th and 39th clauses, which authorised the election of the Chairman, Deputy Chairman, and Board of Directors; the 48th clause, authorising four Directors to form a Board; the 51st and 52nd clauses, which prescribed the general powers of management allotted to this Board, and authorised them to appoint subordinate officers, &c.; the 54th and 55th clauses, the first of which authorised the Board to determine the securities upon which money was to be lent, and to enforce payment of debts, while the latter authorised them to determine the forms and nature of securities, cash notes, &c.; and the 64th and 65th clauses, which provided for general meetings of the shareholders, and required that the books of the Company should be balanced every six months, and an abstract of the accounts submitted to the general meeting, who might appoint a Committee to inquire into them. The 67th clause, which gave power of calling special general meetings, was also read, as well as the 69th clause, which provided for the form of notice for such meetings, and other parts of the deed which gave power to these meetings to adjourn from time to time, and which authorised the Directors to settle matters of account by arbitration, or in any other manner most conducive to the interests of the Company.

Francis Gray Smith was then called, who stated as follows: I am a clerk in the Bank of Australasia, and was so in June, 1843; Mr. Dawson's note was in the Bank when it became due, and I know that notice of its dishonour was given; the book produced is the Bank Notice Book; the notice was filled up by a clerk named Evans, who is now at Hobart Town, but I compared it with the draft in the book; the note was for £2854 0s. 10d., and the notice is dated the 17th June, 1843; it was addressed to H. H. Macarthur, Esq., Chairman of the Bank of Australia, Sydney, and it was enclosed in an envelope addressed to John Walker, Esq., Cashier of the Bank of Australia, Sydney; I went with Mr. Evans to the Post Office, and saw him post it, before six o'clock on the evening of the day the note became due; there is but one Bank of Australia, and I know by report that Mr. Walker at that time acted as the Cashier of that Bank.

By Mr. DARVALL: I am not certain how long Mr. Evans has left the colony—about a month; I do not know whether he contemplated leaving the colony when he made this notice in June, 1843; I did not see him write this notice; I saw both the notice itself and the copy in the book; in examining, I read the letter that was posted; I have since read the copy in the book; I read it I believe on the 19th of June.

By Mr. BROADHURST: The note fell due on the 17th June, which was on a Saturday; I can undertake to say that the copy posted was a correct copy of the one produced.

Hannibal Hawkins Macarthur: I was Chairman of the Bank of Australia many years, until the month of September, 1843, when I resigned. The endorsements on the notes produced are in my handwriting; the endorsement on Potts's is, "Pay the Bank of Australasia or order. H. H. Macarthur, Chairman of the Bank of Australia." I believe I signed this in the Directors' room, and was most probably at the time in the chair; I have not signed bills except in some part of the Bank, but I may have signed bills in other rooms besides the Directors' room—[a question was here put by Counsel, as to whose account these endorsements were made upon, which was objected to by the defendant's Counsel, upon the ground that the bills would speak for themselves, and could not be varied. The Court decided that the question could not be put]; I cannot say in which room I may have signed this; I signed a great many during the time that I was in the chair: I was present at a meeting in May, 1843, when a resolution was passed about my signing these bills; resolutions passing at these meetings were taken down in books; [the minutes of this meeting, which was stated to have been held on the 10th May, 1843, were then called for by the plaintiffs' counsel, and produced by the other side]; I see my signature as chairman of the meeting alluded to in the book produced.

The SOLICITOR-GENERAL then tendered the book in evidence.

Mr. WINDEYER objected to its being received in the character of a minute book, until the meeting was actually proved to have been a special general meeting, according to the terms of the deed, so as to fix the main body of the proprietors; although he admitted that it might be taken in evidence against such of the proprietors as were acting upon that occasion.

After some further discussion the book was put in, to go for what it should subsequently appear to be worth, and Mr. WINDEYER remarked that to save time he wished to be understood as taking a similar objection to each piece of evidence of this description.

Mr. Macarthur's examination being continued, he said: I cannot swear that I saw all the proprietors whose names are mentioned here, but I have no doubt they were present; it was the practice on those occasions to take down the names of those present, and to record all the resolutions agreed to. [The minutes were then read, and appeared to contain a resolution authorising Mr. Macarthur to sign bills, &c.] I perceive my signature as Chairman to the minutes of general meetings on the 16th and 29th of March; I have no doubt that the parties whose names are here were really present at the meeting. [The minutes were then put in and read, from which it appeared that at the meeting of the 16th March, the report of the directors having recommended the winding up of the affairs, a committee of five was appointed to enquire into and report upon the affairs of the Bank. This meeting was adjourned till the 29th of March, when the committee thus appointed brought in their report, setting forth the state of the Bank's affairs, and the amount and nature of its liabilities; and after some further resolutions necessary for winding up those affairs had been passed, the meeting adjourned till the 10th of May. The minutes of a general meeting on the 1st of July, 1843, were also read, which appeared to have been the time of the regular half-yearly meeting, but which meeting was, however, adjourned. The minutes of meetings on the 7th and 21st September, 1843, and 3rd October, 1843, were next put in and read, the latter being the meeting at which a working board of four persons for arranging the affairs of the Bank was appointed. The minutes of a meeting on the 22nd of February, 1843, were likewise put in, as was also the minutes of a board-meeting, on the 29th of March, 1843, the latter being qualified by an admission on the part of the plaintiffs' counsel, that such board-meeting had been held previous to the general meeting which took place on the same day. From this minute it appeared, that at a meeting on the previous day, the Cashier (Mr. Mackenzie) had been authorised to accept bills on account of the Bank. Some argument now took place between the counsel as to the production of the minutes relative to the meeting of the 28th, and they were ultimately withheld; for, as the Solicitor-General refused to consider the minutes handed in by the other side as those which had been called for, unless allowed to read them himself in the first instance, the other side imposed upon him the onus of proving that the document called for was in the defendant's possession. After some further arguments, other minutes of board-meetings were read, among which were the minutes of a meeting at which a resolution had been passed authorising the Chairman of the Bank (Mr. Norton) or the Deputy Chairman (Mr. Thomas Walker) to sign bills on account of the Bank.]

Mr. WINDEYER here observed that he did not tender any of these documents as sufficient minutes in accordance with the deed, but merely as records, to go for what they were worth.

The SOLICITOR-GENERAL contended, that the objection spoken of by Mr. Windeyer applied only to the records of general meetings, and not to the minutes of board meetings.

After some further discussion, however, it was understood that Mr. Windeyer's objection to the sufficiency of these documents, as minutes of the proceedings they professed to record, should be taken as applying to the whole.

A Report of the Directors, said to have been presented to a general meeting on the 29th of March, was then called for by the plaintiffs' counsel, who were required by the other side to prove, in the first instance, its existence.

The SOLICITOR-GENERAL contended, that this was established by the minutes of the meeting in question, which had been verified by Mr. Macarthur.

[Before this point was determined the midday adjournment took place. After the Court had again met,]

His HONOR inquired if there were any facts in this case upon which the counsel could agree, so that a special verdict might be taken upon them, leaving the law of the case to be argued before the full Court.

Mr. WINDEYER said, that as they had had no opportunity of consultation, it was impossible to say what might be done in this manner, although no doubt several days might be saved by an arrangement of this nature.

After some consultation,

The SOLICITOR-GENERAL said, that a consultation would be held this evening, in order to see how far it might be practicable to shorten the case, by making admissions of various matters of account, although he doubted whether they should get so far as to agree to a special verdict.

The Report of the 7th September was then read, and placed in evidence.

His HONOR, addressing the gentlemen of the bar, said that a letter had been handed to him, which he would submit to their perusal, although he would not make its contents public, having been requested not to do so. He was himself no way affected by it, except by a quantity of praise which he would most indignantly disclaim, and it would not therefore in the slightest degree interfere with the present case, but it might be well for the counsel on either side to give it their perusal.

The SOLICITOR-GENERAL said, on the part of the bar, that if this letter was in the slightest degree reflective on His Honor, they must decline to read it at all, as they possessed the most entire confidence in His Honor's integrity.

His HONOR said, that so far from reflecting upon him, it contained a species of praise.

After some further conversation, the bar declined reading the letter until after the case should be terminated.

Charles Falconer was then called, and examined as follows: I am Manager of the Bank of Australasia, and have been so for the last nine years; the document produced is signed "H. H. Macarthur, Chairman," and is the handwriting of Mr. Macarthur, who at that time was Chairman of the Bank of Australia; this document was given to me in the Bank of Australia by Mr. William Henry Mackenzie, who at that time was cashier; I went to the Bank of Australia in consequence of what was stated by Messrs. Macarthur, Norton, and Mackenzie, who came to the Bank of Australasia; Mr. Macarthur was then Chairman, and Mr. Norton was a Director; a correspondence and personal interview had taken place between the two Banks before this, and it was in reference to the subject of this correspondence, and those interviews, that I went to the Bank; I went to receive this document, and I rather think it was given to me by Mr. Mackenzie without my asking for it; I believe, however, before the gentlemen above-named left the Bank of Australasia, I had said I should come for this document, and I now recollect that I also went to see if it was entered in the Bank of Australia's Minute Book. I compared it with the Minute Book, which was produced by the Cashier; after receiving this, I acted upon it in my official capacity as Manager of the Bank of Australasia; I acted thus entirely upon the faith of this document. This second document is also signed by H. H. Macarthur, Chairman of the Bank of Australia, and was given me in the Bank of Australia, on the 29th March, 1843; I asked for it; I also compared this document with the Minute Book of the Bank of Australia, and found it to be word for word. The third of the documents now produced was also given to me by Mr. Mackenzie, in the Bank of Australia; it was taken from the Minute Book, but I do not remember that I compared it with that book; I acted upon this document likewise in my official capacity; the fourth document I got from Mr. Walker, the present Cashier of the Bank of Australia; this fifth document also, which is signed by Mr. Walker, as Secretary and Cashier, I received from that gentleman in the Bank of Australia; this sixth document is similarly signed, and was received by me in the same manner, but there is here a separate writing upon the fly-leaf of the sheet.

By Mr. FISHER: I compared the documents produced with a book which I knew to be the Board Minute Book; it was given to me as the Board Minute Book by Mr Mackenzie; I only know that it was so from being told so; I compared the whole of the extract, and found that it was word for word with the book; it was signed in the book "H. H. Macarthur;" I believe the book produced to be the one which I compared the extract with; I find the copy of the extract and entry in the book to be the same, even the word "copy"—the entry in the book being described as a "Copy of a Minute."

By Mr. FOSTER: This book was produced to me as the original Minute Book by Mr. Mackenzie, and I knew the signatures in the book to be in Mr. Macarthur's own hand-writing.

The Court then adjourned till ten o'clock on Saturday morning.

SATURDAY.—THIRD DAY.

Mr. John Walker was called and examined as follows: I am Secretary and Cashier of the Bank of Australia; I went to the Bank on the 8th of May, 1843, to assist in winding up its affairs; I had no special appointment, but I have acted as Secretary and Cashier; I was assisted by Mr. Mackenzie until the 1st July; I remember a meeting on the 10th of May, 1843, at which I was present; it was a meeting of proprietors; I remember a meeting on the 21st September, 1843, at which a report of the 7th September was read; this was also a meeting of proprietors; the meeting was held nominally at the Bank, but was immediately adjourned to Mr. Lyons's rooms; I believe it was an adjourned meeting, I believe I read a report at this meeting; the report submitted on the 7th was the one read; the paper produced marked D is a printed copy of the report. The report was written by myself, but the original is not in my possession, and I think it is still in the hands of the printers, Messrs. Kemp and Fairfax; I have searched for the manuscript and cannot find it; I believe the printed copy produced to be an accurate copy of the report; at that meeting there was a resolution passed adopting this report; it was at the general meeting of the 7th September that this report was first submitted, but it was on the 21st that it was approved and adopted; I believe that no resolution with reference to the report was passed at the meeting of the 7th; at the meeting of the 21st a resolution was passed to the effect that the report should be printed and circulated among the proprietors; there were proprietors at the meeting of the 21st, but I cannot say that the meeting consisted exclusively of proprietors; it was called as a meeting of proprietors. The *Sydney Morning Herald* of 23rd August, 1843, contains an advertisement signed by me, as the officer of the Bank, and call ng a meeting for the 7th September. [The advertisement being tendered in evidence, it was submitted by the Counsel for the defence, that the manuscript ought to be produced, but it was ruled by the Court, that the advertisement being the actual notice to the public, must be considered as the original document. It was then read.] I advertised by the authority of the directors. The meeting of the 7th was adjourned till the 21st. In the *Sydney Morning Herald* of the 16th September, 1843, there are notices of two meetings, which I authorised under the orders of the directors. [The advertisements were then read, and appeared to be notices of meetings for the 21st September and the 3rd October.] I remember a meeting of proprietors on the 22nd of January, 1844; it was called as a meeting of proprietors, and some proprietors attended; it was their half-yearly meeting. In the *Sydney Morning Herald* of the 8th of January, I see a notice of this meeting, the publication, which I authorised in the same manner as I had done the others [advertisement read]. At this meeting a report was read, which was drawn by myself, and had been submitted to the Board of Directors—the original manuscript, I believe, was sent to the printers, and I believe this to be a correct copy of the report. The document was marked E, and, besides the report, contains some resolutions, the publication of which I authorised. This is a correct report of what took place at the meeting, with the exception of a very few trifling errors. I cannot say from my own recollection whether a resolution was passed at this meeting adopting the report and ordering its circulation. I see, however, that it is so printed. The report was read to the meeting, but, from the number of meetings, I cannot say whether the report was adopted at that meeting or subsequently. One of the books produced is what I found as a Minute Book when I went to the Bank, and the other is the Draft Minute Book. I find in the latter a reference to the 22nd January, 1844, but it has no reference to the general meeting alluded to. I find no reference to that meeting, nor do I find any in the other book; I was present at this meeting in my character of Secretary and Treasurer; but I cannot say whether I took any notes of what passed; I gave a manuscript to the printers of the resolutions; but I cannot say I wrote it myself; I furnished the manuscripts of the report and of the resolutions together, but I cannot say if they were on one paper. The printed report of the 22nd January was circulated among the proprietors, copies were sent to all the proprietors whose addresses were known. There was the same circulating of the printed report of 7th September. I remember that there was a meeting on the 3rd of October; I remember the recommendation of same meeting of proprietors for the appointment of a working board; but I cannot say positively whether it was at the meeting of the 3rd of October. The gentlemen recommended to form this Working Board were James Norton, Thomas Walker, John Gilchrist, and John Stirling. The *Sydney Morning Herald*, of 25th September, 1843, contains a notice of the meeting of 3rd October, the publication of which was authorised by me in the same manner as the notices of other meetings—[advertisement read]; this meeting was, I think, an adjourned one; the document now produced, and marked N., is a fair copy of the rough minutes of the meeting on the 3rd October; and is signed by Mr. Macarthur; the report referred to in this minute was a report of certain parties appointed as a committee, and was read by me to the meeting, when the resolutions here stated were passed; the document now produced is marked F., and purports to be an extract from the minutes of 9th October; it was extracted by me; the resolution here stated was passed at that meeting; seven or eight directors were present. The document produced marked G. is an extract from the minutes of the 16th October; there were eight directors present, and this resolution was passed. [The exhibits marked F. and G. were then read, and appeared to be copies of resolutions of the directors, appointing the Chairman, Deputy Chairman, and working Board; and authorising the Chairman and Deputy Chairman to sign and endorse bills, &c., on behalf of the Bank.] I was present at the meeting of the 10th May; it was called as a meeting of the proprietors: there were a great many persons present, and many of them were proprietors, but not all; I had then only joined the Bank a few days, and was not acquainted with the proprietors; some of them might have held proxies; I remember a resolution passing at this meeting, moved by Mr. Gilchrist and seconded by Dr. Wallace, having reference to Mr. Macarthur; the document produced is a copy of the resolution made by myself. [The resolution was read and appeared to be an authority to Mr. Macarthur to sign and endorse bills on behalf of the Bank.] The letter produced, dated 9th October, 1843, is signed by me, and is addressed to Mr. Falconer, and it was written by authority of the directors. The letter produced, dated 10th of October, was written by me in my capacity as secretary and cashier to the Bank, but was not submitted to the directors, although they afterwards approved of it; it was addressed to W. Hamilton Hart; I know of a deputation from the Bank of Australia, to Mr. Hart, upon the business referred to in that letter; the deputation was composed of two directors and myself. The letter of the 19th October, addressed to Mr. Hart, is signed by me, and was written with the previous sanction of the Board of Directors; I know of a letter with regard to the giving of time to the Bank, but I believe it is now in the possession of the Union Bank; the document produced purports to be a copy of this letter, and was furnished by me to the Bank of Australasia. The letter produced of the 17th January, 1844, addressed to Mr. Hart, is signed by me, and was written by authority of the Board of Directors. After the date of that letter, which is in the hands of the Union Bank—that Bank discounted for the Bank of Australia to the extent of £8000 or £9000. It was in consequence of that letter that it was done, and the Bank of Australia got the time which is mentioned in that letter. The letter of the 19th of January, 1844, is signed by me, and is addressed to Mr. Hart, it was written by authority of the Board of directors. The letter of the 10th of April, 1844, addressed to Mr. Hart, was likewise written by me with the authority of the Board. In this letter two bills are mentioned, Potts's and Dawson's; the former for £3480, and I believe these are the notes declared upon in the present action. In some of these letters reference is made to letters from Mr. Hart—there were such letters received, and some of those written by me in answer. [Several letters from Mr. Hart to the Bank of Australia were called for and produced; as was also the original letter deposited in the hands of the Union Bank.] The signatures are genuine; there are those of Mr. Sea, as Manager of the Union Bank; Mr. Duguid, Managing Director of the Commercial Bank; and Mr. R. Campbell, Junior, President of the Bank of New South Wales.

The letters above-named, and a number of others comprising a mass of correspondence between the Banks, relative to the assistance given by the Bank of Australasia to the Bank of Australia were then read.

The report of the 22nd of January, 1844, was also read, together with the printed copies of the resolutions passed at the meeting of the same day, and appended to the report itself.

Mr. Walker re called: Mr. Stirling was named a member of the Working Board instead of Mr. Breillat, who was one of the gentlemen first proposed. I think I have proved in Potts's estate on behalf the Bank of Australia, and a dividend has been received in Dawson's estate by the Bank. [A question as to whether the amount of Dawson's bill was included in the sum proved by the Bank of Australia against his estate, was objected to by the counsel for the defence, on the ground that the regular way of bringing forward this kind of proof was by producing the records of the Chief Commissioner's Office. On the other hand, it was contended that as a matter of fact the question might be regularly put. His HONOR, however, was of opinion, that the more regular course would be to produce the records of the Chief Commissioner's Office in the first instance; and after proving the insolvency of these parties, with the fact that a proof had been made by the Bank, Mr. Walker might be further examined upon the matter if necessary. Subsequently, however, the counsel for the defence agreed to admit the evidence.] I proved for this note in Potts's estate; it was considerably after the 10th of July, 1843, but I cannot

state the precise time; I cannot say whether I proved under the mortgage or the bill, I believe under the latter; I believe the Bank also proved in Dawson's estate for the amount of his bill, but I am not sure whether it was by my agency; it was after the note became due that the firm of Hughes and Hosking became insolvent, as did also Mr. J. T. Hughes; I proved in Potts's estate by the authority of the Board of Directors, but it was after communicating with Mr. Falconer and obtaining his consent; I also communicated with Mr. Sea. I do not remember telling Mr. Falconer that the Bank was liable; Mr. Edye Manning originally held security for Dawson's bill, which was made over to a clerk in the Bank of Australia for the benefit of both Banks.

By Mr. Lowe: The resolution passed at the meeting of the 10th of May, was drawn originally by the agent of the Union Bank; I know this fact by what passed at the meeting. [A question as to what took place upon the subject of this resolution was objected to, upon the ground that, although formal resolutions might be evidence, mere discussion, in the absence of the Bank of Australasia, could not be received in that character. On the other hand it was contended that the resolutions themselves were nothing more in the abstract than a part of the words uttered at the meeting, and that such being the case, they were entitled to have in evidence all which took place. The Court decided, that all which had been said explanatory of these resolutions might be received, although anything directly contrary to their tenor would be inadmissible.] Mr. Gilchrist said, in explanation, that this resolution was required by the Union Bank.

It was objected by the plaintiffs' counsel, that this evidence could not be regarded as explanatory, and ought not to be received, its real effect being to vary the contract between the parties, of which the resolution empowering Mr. Macarthur to sign bills, &c, formed the basis; for the authority, as far as its own wording went, was given with reference, not to the bills of the Union Bank, but to all bills that might be required. A question arising as to how far the Bank could be regarded as having published this resolution at all, it appeared, by reference to his Honor's notes, that Mr. Falconer had deposed to having received it from Mr. Mackenzie in the Bank; the right of Mr. Mackenzie to do this was disputed, and Mr. Walker having been recalled, stated, that when he (Mr. W.) first joined the Bank, on the 8th of May, he understood that he was appointed in the room of Mr. Mackenzie, and that the office of the latter had ceased, although he remained in the Bank to assist until July, and was held responsible in matters of account only. It was Mr. Walker's opinion, therefore, that Mr. Mackenzie would not have the right of giving out any of the minutes, unless specially authorised to do so by the directors, and he was not aware of any authority having been given upon this occasion. The argument upon the objection was then proceeded with, and it was contended that as Mackenzie had been all along acting as an officer of the Bank, and no notice had been given to the Bank of Australasia of his authority having ceased, they were entitled to look upon the document as having been issued with proper authority. This resolution, it was contended, was analogous to an Act of Council, and could not be varied by the speeches which might have taken place previous to its adoption, while forming, as it did, the grounds of contract between the parties: the most dangerous consequences to the mercantile community might follow, if, by admitting evidence to vary that contract: a door should be opened for one party to an agreement, after having obtained the money of another, to turn round and declare that his original intentions were not wholly in accordance with the terms of the instrument upon which the agreement had been founded. In reply to these objections it was contended, that although answerable for the acts of Mackenzie while he really continued an officer of the Bank, their liability wholly ceased so soon as Mackenzie ceased to be such officer. The resolution, it was urged, was not at all analogous to an Act of Council, being, on the contrary, nothing more than the result of the meeting's deliberations, and forming, as it were, a part of those deliberations, which might be explained by a reference to what had passed precedent to the actual adoption of the resolution itself. Thus, if the resolution was only passed upon the understanding that it had reference to the transactions with the Union Bank and no other, this understanding was an explanatory matter that the defendant had a right to have in evidence.

After the subject had been argued at great length, His Honor reserved his decision upon the point until Monday morning.

Court adjourned until ten o'clock on Monday morning.

Monday.—Fourth Day.

His Honor delivered his decision upon Mr. Lowe's question as follows:—

In the course of the proceedings in this action on Saturday, Mr. Lowe, of counsel for the defendant, proposed in the cross-examination of Mr. John Walker, to ask this question, viz.: At the meeting of the 10th May, 1843, was it not stated by Mr. Gilchrist that the resolution was passed on account of the Union Bank? The only way in which the resolution is evidence at all, is, that it was one of the circumstances which induced the contract now under consideration. If it was clear in point of fact that the one Bank held out this resolution as a ground upon which others might contract, and that the other Bank so contracted, then the latter cannot be affected by any instructions by the donor of the authority expressed in the resolution to the agent limiting its provisions, of which restriction it was ignorant. But if the Bank of Australasia knew that the power apparently conferred by the resolution was to be exercisedonly on account of the Union Bank, they cannot avail themselves of it. Whether the two Banks contracted upon the resolution, whether it was made, whether the restriction involved in the question was created, whether the resolution was communicated to Mr. Falconer by proper authority, or the restriction made known to him, are facts in the case, the existence of which must be determined by the Jury. I therefore allow Mr. Lowe to put the question he proposes.

His Honor then said that he had considered a great deal upon this case, not with reference to the law but to the facts, which were of a most voluminous nature, ranging over a long period of time, and including a mass of documents, the bearing of which would require a most careful consideration. Bearing in mind the difficulty of disposing at *nisi prius* of such a case as this, he would again beg to ask the counsel on either side whether it was not possible that some such arrangement might be made as was usual in England in cases of the same description. In the case of Dand v. Kingscote, reported in Meeson and Welsby, page 174, a special report was made by a barrister upon all the facts, after hearing the whole of the witnesses, in the same manner as if he had been an arbitrator, and the questions of law were left to be determined by the full Court. This he conceived to be a much more convenient course in a case like the present, and he would beg to suggest the propriety of considering whether some such arrangements might not be effected.

The Solicitor-General said, that although the case took up some time, he did not apprehend it would be found at all complicated.

Mr. Windeyer remarked, that when the defendant's case came to be heard, His Honor would find it as simple as possible.

His Honor remarked, that he merely threw out the suggestion, by way of pointing to a course which had been pursued over and over again in England.

The Solicitor-General said, that he did not think the Managers of the Bank of Australasia would feel justified in incurring the responsibility of departing from the regular course, inasmuch as they would by so doing expose themselves to strong animadversions from the Managers and proprietors of the Institution in England.

Mr. Walker was then re-called and cross-examined by Mr. Lowe, stating as follows:—In moving this resolution, Mr. Gilchrist said it was required by the Union Bank, and that it was intended for them, or words to that effect. Mr. Gilchrist is a Director of the Union Bank, and was so then. Mr. Mackenzie was in the employment of Hughes and Hosking from the time that I joined the Bank in his room, and his salary ceased from the Bank at that date, although he remained to assist me. During the period of this loan upwards of £150,000 was paid to Hughes and Hosking by the Bank; this I know from the examination of the Bank books; I am also trustee of Hughes and Hosking's estate, and know it from their pass books; I, as trustee, have admitted this debt. [A question as to Mr. Walker's knowledge of the money having been actually lent was objected to, and after argument by counsel, was overruled by His Honor, upon the ground that as the knowledge of the witness was derived from books and documents, the books and documents themselves were the only admissible evidence.] There are about one hundred and seventy-six proprietors in the Bank of Australia; all the proprietors are not resident in this colony; I do not know of my own knowledge that any of them are resident in England, or that copies of the reports were sent to them: I was authorised by the Board of Directors to send advertisements to the newspapers; I was present at the meeting of the 10th May, and subsequent meetings. The questions were always decided by show of hands, except upon two occasions; on one of these two occasions there was a division, in which each individual was counted, but except at the meeting in January, 1845, I never saw the mode of voting by ballot resorted to. Since I have been a servant of the Bank of Australia there has been one application for a transfer of shares; it was by Mr. Isaac Titterton, and was about the end of 1843; I cannot say of my own knowledge whether all his shares were fully paid up; I know however that Mr. Elliot, to whom the transfer was to have been made, tendered the amount of a call; the transfer was refused, and I communicated the refusal to Mr. Titterton, by the authority of the Board; I was present at the Board at the time of the refusal. [A question as to the reason of the refusal was objected to by the plaintiffs' counsel upon the grounds that it was irrelevant to the issue, and that the acts of the Board in this manner—with which the plaintiffs had nothing to do, and of which they could have no knowledge—could not be made evidence. On the other hand it was contended, that one of the conditions of the loan being "that no tranfer of shares or stock should be made without the consent of the Bank of Australasia," the defendant had a right to show a full compliance with this condition, and this, it was said, would be the probable effect of the present line of evidence. His Honor decided that the question at issue being whether the Managers of the Bank of Australia were authorised to make and endorse these bills, it was impossible to see how facts long subsequent to the transaction in question could be relevant, and unless some further proof of relevancy was given the question must be refused.] The Union Bank advanced upwards of £8000 to the Bank of Australia in October, 1842. It was done on the security of bills held by the Bank of Australia, and which were re-discounted by the Union Bank. These bills so re-discounted have been renewed during the time I have been Cashier. The largest number of persons present at any meeting I have been present at, has been about thirty, including the directors. There was a meeting of the 10th of May for the election of five directors, at which I was not present. Mr. H. H. Macarthur was Chairman of the Bank when I joined it—Mr. Spark had been Deputy Chairman, but I do not know who was Deputy Chairman then. Mr. Norton, Colonel Shadforth, Captain Dumaresq, and Dr. Mitchell, were directors; Mr. George Miller, Mr. Briellat, Mr. Stirling, Mr. Gilchrist, and Mr. Jones, were temporary Directors previous to the meeting of the 10th May; Mr. Edge, the teller, and Mr. Burrowes, one of the clerks, left shortly after I joined, and most of the other banking clerks left about the same time, in pursuance, as I understood, of previous notice; no fresh bills were discounted, nor any other banking business carried on after I joined; as trustee of the estate of Hughes and Hosking, I have admitted claims from the Bank of Australasia to the extent of about £6000. [It was objected by the plaintiffs' Counsel that Mr. Walker's statements upon this point could not be received, the proper evidence of the proofs being the records of the Insolvent Court; while as to the real amount of this claim itself Mr. Walker could have no knowledge. On the other hand, it was contended that the mere fact of what amount of the Bank of Australasia's claim was admitted, and what disputed, could be properly received, and was material to the issue. His Honor refused to admit the evidence, upon the ground, that although the amount of the Bank of Australasia's claim might be material, the admissions or non-admissions of Mr. Walker, could not be legal evidence upon that point.]

By Mr. Broadhurst: A letter addressed to John Walker, Esq., Cashier of the Bank of Australia, would, I presume, come to my hands through the post; I cannot speak positively as to the number of persons present at the meetings, nor can I tell who held proxies, except at the meeting of January, 1845, when they voted by ballot, and the proxies by that means appeared. I cannot say whether any copy of the resolution of 10th May was sent to any other Bank besides the Union Bank, but it is probable that one might have been sent, for I have seen in the possession of the Bank of Australasia a copy of the resolution. I have no recollection of having received any instructions to send a copy to another Bank; the letter of 26th June, 1843, from myself to Mr. Falconer, was written by the authority of the Board of Directors, but under a protest by two members of the Board; the letter of 15th June, 1843, from myself to Mr. Falconer, was also written by the authority of the Board of Directors, and I am not aware that there was any protest with reference to this letter; two of the bills produced were enclosed in one of those letters, but I do not think that the third bill was enclosed in the other letter; I think it was delivered afterwards, and it is not referred to in either of those letters; the letters both refer to the matter, and have no reference to a third bill; the whole of the three bills produced were, however, sent by me to the Bank of Australasia, under the protest of two members of the Board, as I have before mentioned; the protesting members were a minority of the Board; the letter now produced of 14th June, 1843, from myself to Mr. Falconer, was likewise written by the authority of the Board of Directors; the bills are signed by Hannibal Hawkins Macarthur, Chairman of the Bank of Australia. [The above letters and bills were then put in and read, the latter appearing to have been forwarded for the purpose of retiring other bills in the hands of the Bank of Australasia. The bills were—one for £63,112 9s., dated the 16th June, 1843; one for £43,327 1s. 7d., dated the 26th June, 1843; and one for £47,128 5s. 11d., dated the 22nd July, 1843, the whole being for three months.]

By Mr. Lowe: Mr. Breillat was appointed a director about September or October, 1843; since I joined the Bank Colonel Shadforth has been re-appointed a director, and I think Mr. Macarthur has been also re-appointed; Major Smyth was also appointed; I think all these appointments were in 1843.

By a Juror: I never was formally appointed Secretary and Cashier, but I have acted in that capacity; I was so appointed as to supersede Mr. Mackenzie; Mr. Mackenzie assisted me until I became conversant with the affairs of the Bank.

Mr. Falconer recalled: I am fully acquainted with all the circumstances attending the advance from the Bank of Australasia to the Bank of Australia; I have in my hand the document which I received from Mr. Mackenzie in the Bank of Australia; before that time I had been in communication with Mr. Mackenzie upon matters connected with the Bank of Australia; he then was Cashier, and when I received this document from him I had no notice of his having ceased to act as cashier; I therefore communicated with him as if he held the same office; the document was received by me on the day of its date, or on the day following; after this, in the course of my dealing with the Bank of Australia, I received bills signed by Mr. Macarthur; I received these bills in consequence of the resolution copied in the document; our Bank made an advance to the Bank of Australia after receiving this document; what I term an advance was made by discounting bills. [The defendant's counsel objected to Mr. Falconer being examined as to the amount of the advances, inasmuch as he could only obtain this knowledge from the books, and the fact of whether there was really any advance to the Bank of Australia at all was a pure question of law; it was offered, however, to admit this evidence, provided the Counsel for the plaintiff would suffer the defendant's witnesses to make a similar statement with reference to their views of the accounts. This offer was refused, and it was contended that the evidence of Mr. Falconer, conversant as he was with the whole transaction, was quite admissible for the purpose of showing the manner in which the advances had been made, and the amount of such advances His Honor decided that Mr. Falconer must not be asked as to any conclusions which he might have formed, but might be asked as to the details of what he termed an advance.] We had a balance in February, of £3109. The settlement of balance is made by two clerks of the several Banks, and these settlements are also made in my presence and under my superintendence. The three bills produced [those proved by Mr. Walker] were received by me from the Bank of Australia—other bills had been previously discounted by our Bank for the Bank of Australia, which were severally mentioned in the letter enclosing two of the bills now produced. The bill for £17,128 5s. 11d., was received, I think, on the day it is dated, the 22nd July. I received it from Mr. Walker, the cashier of the Bank of Australia; before that time I had had a conversation with Mr. Walker as to the purpose for which I was to receive this bill; Mr. Walker said it was to retire bills previously discounted by us for the Bank of Australia. I have settled an account with Mr. Walker, but there was upon the occasion a rough statement of the figures in writing: we received a bill for the amount of these three bills, together with a cheque, the latter to meet the balance which remained due over £154,000. I received for the bills alluded to, this bill which I hold in my hands, and a sum of money which I believe was the proceeds of the cheque. By referring to the ledger, I perceive that the cheque must have been on the Union Bank; the last bill is signed "J. Norton, Chairman, for and on behalf of the Bank of Australia." It is Mr. Norton's signature, and I knew him to be Chairman at that time. When the deputation from the Bank of Australia waited upon Mr. Hart to negotiate a loan, they produced a statement which I now hold in my hand; Mr. Norton was there. Besides the written statement, there are figures in pencil, which I believe to be those of Mr. Norton; the deputation represented this to be a statement of the affairs of the Bank of Australia at that time; this was on the 21st of February, 1843; they stated they were a deputation; the gentlemen composing this deputation were Mr. H. H. Macarthur, the then Chairman, Mr. James Norton, and Mr. Edye Manning, directors, and Mr. Mackenzie, the Cashier; Mr. Norton stated that they had only £4860 in gold, and that the notes in circulation amounted to £17,969; deposits, £21,266 15s. 3d.; current accounts at 4 per cent. to £69,624; Colonial Treasurer's balance for Port Phillip, £583. The total of these direct liabilities, was £113,648, and of indirect liabilities, comprising acceptances and notes (principally on account of Hughes and Hosking, and the individual partners of that firm), there was £143,500. Mr. Norton stated that unless they got immediate assistance they must suspend payments; all this passed before the application for a loan was agreed to; Mr. Norton stated, that from his own personal knowledge, he knew Hughes and Hosking's property to be worth from £500,000 to £600,000; of the £150,000 we had some bills in our possession belonging to Hughes and Hosking. [The bill for £154,000 was then read].

By Mr. Windeyer: The statement I have referred to is called statement No. 1; there is also a statement called No. 2; it was the latter that was admitted by the Banks to be correct, and was acted upon; there was a week between the two; I could not say from memory all which took place at the meeting where statement No. 1 was referred to; it was upon Mr. Hart's expression of surprise at the large engagements on account of Hughes and Hosking, that Mr. Norton spoke of the value of their property; Mr. Hart is the superintendent and head of the Bank, and it was by his authority these discounts were made. Mr. Hart is still the chief officer of the Bank in this colony; I believe I was present at all the interviews which Mr. Hart had relative to the settlement of this matter; we had before discounted bills for the Bank of Australia, and had had other dealings with it as a bank; I knew that it was a Joint Stock Bank, having a deed of settlement, and being governed under that deed by a Chairman, Deputy Chairman, and Board of Directors, and a printed copy of the deed was furnished to us at our request; I am not aware that any copies of the statement I have referred to were sent out of our bank, except a copy to the Union Bank; after the failure of the Bank of Australia some numbers were attached to these documents, and they were shown, in strict confidence, to two of the proprietors of the Bank of Australia. The one which was given to Mr. Maclaren was given to him in his character of Manager of the Union Bank; but he must have been a shareholder at the time. [Mr. Wyndeyer here stated that he thought it due to Mr. Maclaren to say, that that gentleman had made no communication to them with reference to these documents.] The power of Mr. Hart is supreme in the management of the Bank. The failure of the Bank of Australia took place in 1843; I considered them to have failed when they ceased to be a bank of issue and deposit; I think it was in March, 1843. The difference in the account produced between the terms "Acceptances H. and H." and "Bills H. and H." was, I think, that the one was actual acceptances by the Bank, and the other their liability on account of guarantees by Mr. Mackenzie; the item of "Bills" is expressive of those guarantees. I recollect Mr. Norton saying that the guarantees were given by the Cashier; and to the best of my recollection, Mr. Norton said that these guarantees were on behalf of the Bank. There had been a previous overture from the Bank of Australia, and there was also a subsequent statement, the latter being what was really acted upon. Our Bank held bills of Hughes and Hosking's. [A question as to whether the witness knew what the gross amount of these bills was, was objected to by the plaintiffs' counsel, on the ground that it had reference to documentary evidence, which ought to be produced. On the other hand, it was contended that it was quite open to the witness to give the result of his knowledge of the accounts, and without any reference to the several documents to state, as a fact, the whole amount. His Honor decided, that the documents ought to be put in the hands of the witness before any question was put to him respecting them; for even his knowledge of the total sum must be known from adding the several amounts expressed upon these documents.] We have not waived any of our claim against Hughes and Hosking; I do not think any dividend has been received; I am certain as to a cheque having been given to me along with the £154,000 bill; the transaction, according to banking custom, would be considered as squared by the bill and the proceeds of the cheque.

By Mr. Foster: It was for the three bills formerly produced, and their interest, that Mr. Norton's bill and the cheque were given; statement No 2, of which I have before spoken, was not introduced at all at the first meeting, but about a week afterwards; I got the statements from Mr. Norton; he brought statement No. 2 to our Bank; although Mr. Hart was the superintendent, I was acting under him in this matter, and was acquainted with all the transactions.

The Court then adjourned till ten o'clock on Tuesday morning.

Tuesday.—Fifth Day.

Mr. Falconer stated to the Court that there were two points in his evidence which he wished to explain. The first was with reference to the cheque which had been given to make up the difference of accounts, along with the £154,000 bill; and he stated yesterday that this cheque was upon the Union Bank, but since then had discovered that it was upon his own Bank, and that cash, as well as this cheque, had been given to square the account. The second point was, as to the time he received the document of the 10th of May, which he found, by reference to the *Sydney Morning Herald*, he had stated was on the day it bore date, or the day afterwards; what he meant to have said was, that he received it on the day after it bore date, or the subsequent day.

Upon being examined by Mr. Windeyer with reference to this point, Mr. Falconer said: I debited the Bank of Australia with the amount of the bills and interest due upon them, after crediting them with this cheque and the bill and money received. My evidence on this point, yesterday, was perfectly correct, except as to the amount of the cheque and the Bank it was drawn upon.

By Mr. Foster: It was arranged that this bill should be for a round sum, and that the difference should be paid by the Bank of Australia; my mistake, yesterday, was, that I believed the whole amount in difference, to have been paid by cheque, and I now find that part was paid by cheque and part by cash.

Mr. Macarthur re-called: I know the signature to the document produced, dated the 27th February, 1843; it is Mr. Mackenzie's letter, who was then Cashier of the Bank; I think I was present as Chairman at the Board when it was determined that a loan should be obtained from the Bank of Australasia; but there were many negotiations upon this matter at which I was not present; in the book produced I see a minute dated 22nd February, 1843, signed by myself; from reference to this minute, I can now say that the resolution here minuted was come to by the Board; I find also a minute of the 28th of February; I cannot say that (without reference to the minutes) I can recollect any resolution authorising Mr. Mackenzie to accept drafts, &c.; I find here, however, a minute of a resolution authorising this gentleman to do so, and seeing my own signature there I am quite sure that such a resolution must have been passed, and that by a Board of Directors, composed of a sufficient number of directors to make the meeting a complete one; I find by the minute that six directors were present, and four constituted a Board; this is the minute book which I was in the habit of signing; I was present at a deputation which went to the Bank of Australasia relative to the loan; I see the Board minute I have signed agreeing to the loan, but I cannot say whether it was before or after this that I went to the Bank of Australasia; I think it was on the 23rd of February, and my reason for thinking so is, because I received a particular note on that day; Mr. Norton and Mr. Mackenzie were present; there was a statement of the Bank of Australia produced, and I recollect Mr. Norton stating that to his own knowledge Hughes and Hosking's securities were worth from £500,000 to £600,000; I do not recollect any proposal that the Bank of Australasia were to take Hughes and Hosking's liabilities; I have seen so many statements all varying so much, that I cannot say whether the one produced was used on that occasion; we were deputed by the Board of Directors, and I was myself present when we were so deputed; I find in this book the minutes of a meeting of the 16th March, signed by myself; before signing I looked at the minutes to see that the report was correct, having myself been present; from this I can say that what is here recorded took place; I likewise find here a minute of the 29th March, signed by myself, and I can take upon myself to say that the record here is correct; I can say the same with reference to the minutes of the 10th May, the 1st July, and 7th of September, the 21st September, and the 3rd of October. After this I resigned, but I have been since at general meetings, and at one of the board meetings; I cannot say whether I was at a meeting in January, 1844; I do not remember being present at any meeting when anything was said about time being given; I was in the chair at the time of the resolution of the 10th May, authorising me to sign bills, was passed, and I acceded to the request conveyed by the resolution; I have acted upon that resolution; this was a general meeting of proprietors. [A question, as to whether a particular bill then produced was made by the witness in consequence of the authority above stated, was objected to by the defendant's counsel, upon the ground that both the authority and the bill would speak for themselves, and that the sufficiency of the authority and the legality of Mr. Macarthur's actings, were both questions of law upon which Mr. Macarthur's own notions could not be taken. His Honor sustained the objection.] The bill produced of the 15th May is signed by me, and was so signed subsequent to the passing of the resolution; I endorsed this bill in consequence of a request of the Board of Directors; I never endorsed a bill without the direction of the board, independent of the resolution of the 10th May; I can take it upon myself to swear that any bill or other paper, signed by me as Chairman of the Bank of Australia, has been so signed by the direction or instruction of the board; I cannot say when Mr. Mcakenzie ceased to act as cashier; I think about the end of March; I do not know of any communication of the resolution of the 10th of May to any parties, or of any authority to make such communication.

By Mr. Windeyer: I cannot say who were the directors of 1842; Mr. A. B. Spark was a director then and at the time of the negotiations; Mr. Edye Manning was also a director; Mr. John Lord had been a director, but I cannot say whether he was so at the time of the negotiations; there had been negotiations previous to the 23rd of February, at which I was not present; I did not know of any liabilities on account of Hughes and Hosking in January, 1843; I never entered into the accounts; I do not know that the Board of Directors ever gave Mr. Mackenzie any other authority to create liabilities than that already spoken of; I never heard of Mr. Mackenzie having pledged the credit of the Bank on account of Hughes and Hosking, until after these negotiations; I think there had been the usual half-yearly meeting in January, 1843, previous to the negotiations, but I am not positive; I was not aware of liabilities on account of Hughes and Hosking until after the negotiations had commenced, except the ordinary business bills, which I have occasionally seen previous to their passing; there was a liability book kept at the Bank which I have looked into, although I have never carefully inspected it; I was not brought up to the business of banking, but I should presume that the managers of the present English banks know something of English banking business; I cannot say how many among the bank directors of Sydney have been brought up to the business of banking; I think the Bank paid the dividend of January, 1843; the minute produced is signed by myself, and I can now say that there was a meeting at the time in question, at which I was present; I should also say that at that time I did not know of any liability of the Bank on account of Hughes and Hosking; I do not recollect any dividend was paid at that time, nor can I of my own recollection remember what took place at the meeting; although I know what is recorded in the minutes to be correct.

By the Solicitor-General: I never paid much attention to the details of Bank business, nor did I always attend board meetings; I have attended for weeks together, and have been absent for weeks together; although I never knew of any other authority to Mr. Mackenzie relative to the signing of drafts than that already spoken of; it is possible that there may have been some such authority; I recollect that the Board of Directors agreed to have a meeting called for the particular purpose mentioned in the newspaper produced, which is the *Sydney Morning Herald* of March 2, 1843; the date of the advertisement is the 21st February, and signed by Mr. Mackenzie, who would be the proper party for signing such a notice; the next paper, which is the *Sydney Morning Herald* of March 25, contains a similar notice of an adjourned meeting, as does also the *Sydney Morning Herald* of the 14th April. I do not recollect whether there was any authority from the Board of Directors for these advertisements, but I have no doubt there was such authority; I recollect something passing at the Board relative to the election of directors, which is the subject referred to in the notice last produced; I also remember the retirement of some of the old directors, and the election of new ones, but cannot state the names of the latter.

The letter of the 27th February, from Mr. Mackenzie to Mr. Hart, containing the condition of the loan, was put in and read, together with the advertisements referred to by Mr. Macarthur.

At this time the Court adjourned for an hour, with the view of affording time for the Counsel to consider as to whether some arrangement might not be made which would tend to shorten the case.

After the Court had again met and some further discussion had taken place,

The Solicitor-General stated, that propositions had been submitted on both sides, and that after due consideration, the following terms proposed by the defendant's Counsel, had been acceded to, namely:—That Mr. Walker or others on the part of the Bank of Australia, and Mr. Hart or others on the part of the Bank of Australasia, should be called to prove the accounts, producing the books and documents in which those accounts were contained, without any necessity of calling the clerks by whom the entries were made, although liberty should be reserved to either side to dispute the correctness of those entries, and that Mr. Hart's letter should be admitted in evidence, without dispute.

William Charles Greville, was then called, and stated as follows: I am a clerk in the Colonial Secretary's Office, and produce several statements from the records of that office of the average amount of liabilities and assets of the Bank of Australia, such statements being made in pursuance of the Act of Council. I know as a matter of fact, that these statements were published in the *Government Gazette*, but I have not got the *Gazettes* in which they were published; the returns embrace the years 1841 and 1842.

The statements above proved, and an advertisement admitted to have been published by direction of Mr. Walker, under the authority of the directors, were then put in and considered as read.

A witness having been called who did not appear, the Solicitor-General stated that they were not prepared to carry the case any further that evening, as it would be well that the witnesses who would be called to prove the accounts should have time to look into them.

The Court then adjourned until ten o'clock on Wednesday morning.

Wednesday.—Sixth Day.

Donald Larnach was called and examined as follows: I am a shareholder in the Bank of Australia; I believe I received a copy of the report of 22nd January, 1844, as a proprietor; I believe I was present at the meeting at which this report was adopted; I have no distinct recollection of seconding any resolution at that meeting with reference to the report, but the impression on my mind is, that I did so; I do not recollect anything as to what the resolution was; I have no recollection of any resolution having passed at that meeting with reference to the report; I have no recollection of any motion having been passed at that particular meeting as to how questions submitted to the meeting should be decided; I have been present at several meetings, and questions were always decided by show of hands, except on one occasion; I cannot swear positively that questions were decided in this manner in consequence of a previous resolution; I recollect such a resolution being passed at some meeting at which I was present; the usual mode of deciding questions at these meetings was by show of hands, and I believe that this was usually done under a previous resolution, which had also been adopted by show of hands.

By Mr. Darvall: I have been a shareholder about two years and a half, and have attended nearly all the general meetings of proprietors during that period; with one exception I never saw the ballot resorted to, and this I believe was in January, 1845.

William Bowman: I am a shareholder in the Bank of Australia; I might have been present at a meeting on the 22nd of January, 1844, but I have no recollection of it; I do not recollect moving any resolution about that time.

Henry Smyth: I am a shareholder of the Bank of Australia, and have taken much interest in its affairs; I do not particularly remember attending the meeting of the 22nd January, 1844; but I think I attended them all; I do not remember moving the resolution now read; it is more than probable that as a shareholder I did receive the report adopted at that meeting, but as there have been many reports I cannot call to mind; I think I have moved a resolution, but I cannot be sure that I have done so, nor can I recollect what the substance of the resolution was; I recollect several occasions on which resolutions were passed adopting reports, but I cannot speak as to this particular date; it was the usual practice to pass such resolutions.

By Mr. Windeyer: I only recollect one meeting at which the ballot was used; that meeting was for the election of directors, and I think I was elected a director on that occasion; I cannot recollect the number of votes, nor am I sure that I was really in the room at the time of the ballot; the resolutions were generally written and put into my hand two or three minutes before moving them, but there was usually a great deal of discussion.

By Mr. Foster: I cannot recollect by whom these resolutions were put into my hand; I never moved or seconded any resolution that I did not approve of.

Mr. Falconer recalled: I am cognizant of all these transactions, and have examined the books very accurately; I can speak of the document I now produce being a correct statement of what I term the advance to the Bank of Australia; there are a variety of statements in these particulars thus headed:—"To amount due from the Bank of Australia to the Bank of Australasia upon this day's transactions"—it means that after deducting the amount of their deposits from the deposits we had made to them that day, this sum remained due to us upon that day's transactions; this sum, strictly speaking, ought to be paid in cash at the end of every week, but was allowed to stand over. [The question as to whether any arrangement with reference to this matter had been made between the two Banks, was objected to on the part of the defendant's Counsel, upon the ground that its effect was to ask Mr. Falconer's own impression as to what constituted an arrangement. The question was ultimately abandoned.] It was Mr. Mackenzie, the Cashier of the Bank of Australia, who settled the accounts with me on the part of that Bank. The exchange books were marked daily by the clerks of each bank, and at the end of the week Mr. Mackenzie gave a promissory note for the balance due to us, provided such balance was in our favour; but if against us, we paid the difference. The system is to present the account of each bank, and the party against whom the balance is, pays the difference in gold; this was the practice before the loan was agreed upon, but after this we received notes for the balance. The promissory note I received on the 6th March, from Mr. Mackenzie was for £36,400; it was to cover the balance due to our Bank from the Bank of Australia from the operations of that week. All transactions were done in this way; and these notes being discounted, were carried to the credit of the Bank of Australia; each bank has an exchange book; they exchange twice a day, and settle every Monday evening. The vouchers were given up to the Bank of Australia; there is an item in the account of Macquoid's cheque paid by the Bank of Australasia for the Bank of Australia; the cheque produced is the cheque referred to, and was paid by us; it is drawn upon the Bank of Australia, [a question as to whether the Bank of Australasia paid this cheque in consequence of its being marked "good" by the Bank of Australia, was objected to by the defendants' Counsel, as tending to give Mr. Falconer's own version of what constituted the arrangement; but after some discussion it was agreed that Mr. Falconer, without referring to the arrangement, might state simply the facts which influenced the Bank of Australasia.]. I received the letter dated the 27th February, 1843, from Mr. Mackenzie, on the day of its date. [The letter was then read, and appeared to be a request or authority from Mr. Mackenzie to take cheques marked good either by himself or Mr. John Edge.] The note produced is the one I received from Mr. Mackenzie, for the £36,400. It is for three months, dated 6th March, 1843, and signed W. H. Mackenzie, on account of the Bank of Australia, as per minute of the Board of 28th February, 1843. I received this cheque at the same time, for the balance due to us on account of the week's transactions. The exact weekly balance within a few pounds was the same as the amount the cheque is for, the amount of the balance being £35,578. The proceeds of the bill for £36,400 was carried to the credit of the Bank of Australia. [A number of cheques and bills were then produced and read, some of which were cheques of Hughes and Hosking's, and others, which had been marked "good" by Mr. W. H. Mackenzie or Mr. Edge; some were checks for daily and weekly balances due to the Bank of Australasia; some were cheques in favour of other banks, drawn by Mr. Mackenzie, as the Cashier, or by Mr. Edge, as the acting Cashier of the Bank of Australia, upon the Bank of Australasia; some were cheques given in exchange for notes of the latter bank, which had been sent to the Bank of Australia; some were cheques given to retire bills which had been previously discounted by the Bank of Australasia; some were bills accepted by Mr. W. H. Mackenzie, as Cashier of the Bank of Australia, which were stated to have been discounted by the Bank of Australasia, and the proceeds carried to the account of the Bank of Australia; some were cheques, &c., signed by Mr. John Walker, as Cashier of the Bank of Australia, after the retirement of Mr. Mackenzie; some were promissory notes in favour of the Bank of Australasia, signed by Mr. H. H. Macarthur, as Chairman of the Bank of Australia, or cheques, &c., similarly signed; and others were cheques, &c., signed by Mr. Norton in the same capacity. The evidence of Mr. Falconer was then proceeded with as follows.] We have given credit to the Bank of Australia in this

account for what we have received. When we received a bill from them to discount, we conveyed the proceeds to their credit, and every amount received in their favour has been properly entered on this account, the account being an exact copy from the ledger which is also in Court. The account was closed by a cheque for £276 13s. 8d. given to us by Mr. Norton along with the large bill. The cheques produced are those of Mr. Norton, as Chairman, for the several sums of £43,621 9s. 4d., £47,179 15s. 9d., and £63,679 11s. 10d., which were given to meet the bills of Mr. Macarthur; and it was for these amounts collectively that the £154,000 bill, the cheque before alluded to, and a sum in cash, were given. The document produced is an analysis of the accounts; and I am enabled to state, from my knowledge of those accounts, that this analysis is correct [The witness then proceeded to read the document produced, from which it appeared that the total amount of the payments said to have been made on account of the Bank of Australia were £188,670 9s. 4d. From this was deducted £24,699 15s. 11d., for cash paid in, and £2841 10s. 7d., being the proceeds of Dawson's bill, leaving a balance in favour of the Bank of Australasia, amounting to £156,129 2s. 10d.] At the time the loan was agreed upon, we held above £46,884 15s. of Hughes and Hosking's bills, with what I term acceptances, by the Bank of Australia; I believe the bill produced to be in the form generally adopted in the bills alluded to; of the above amount, £31,000 was for Hughes and Hosking, and £15,884 15s. for John T. Hughes; all these bills were in our possession on the 27th February, 1843, and were obtained from Mr. Mackenzie, the Cashier of the Bank of Australia; we discounted them. On some occasions when we became the discounters, one of the partners in the firm of Hughes and Hosking was present. [A question as to what was said by Hughes or Hosking, in the presence of Mackenzie, relative to the appropriation of the proceeds, was objected to by the defendant's counsel, upon the ground that proof must be given of Mackenzie's authority before anything said in his presence could be binding on the Bank. On the other hand it was contended, that as it would appear on the face of the bills that their proceeds belonged to Hughes and Hosking, the statement of one of these parties might be taken for the purpose of varying the operation of the bills in this particular. His Honor disallowed the question, on the ground that either Mr. Hughes or Mr. Hosking might themselves be called.] In the first instance the proceeds of the bill for £4600 were placed to the credit of Hughes and Hosking; the two bills of Hughes and Hosking for £8000 each, which I hold in my hand, were brought to me for discount by Mr. Mackenzie. Cheques were brought to me with the bills alluded to. [Two other questions, which were put with a view of ascertaining what passed on the occasion referred to, were, after argument, disallowed by His Honor; the question last put, and having reference to what was supposed to have been said by Mr. Mackenzie, being determined by His Honor upon the ground that there was no proof of his being the agent of the Bank of Australia for this particular purpose.] Cheques were brought to me by Mr. Mackenzie at the same time as the bills; the cheque produced is for £14,600 in favour of the Bank of Australia by Hughes and Hosking; the proceeds of the cheque and £2800 more on this account was paid to the Bank of Australia in the usual course of business, £5560 being in gold; this was on the 20th of February, the day on which both bills bore date, and I perceive from the bill book produced there was a balance on that day in their favour of £5,560 10s. 3d.; but for the fact of the Bank of Australia getting credited with the proceeds of this cheque, they would have had to pay us above £8000; in discounting bills the usual course is, to place the proceeds to the credit of the parties, and to pay over such proceeds, but on this occasion the Bank of Australia was credited with the proceeds of the cheque, even before Hughes and Hosking were debited with it. The proceeds of the other bills of Hughes and Hosking and J. T. Hughes were paid to the credit of the Bank of Australia, with the intervention of cheques. The first bill for £7000 odd was, however, an exception, as Loan Company's scrip was given for it. The cheques produced are a portion of those given.

The Court then adjourned till ten o'clock on Thursday morning.

THURSDAY.—SEVENTH DAY.

Mr. FALCONER recalled: Since last night I have gone through the books to trace the bills of £46,884 15., the result is the same, although there is a slight variance in the details from my statements of yesterday; this amount consists of seven bills, the first is dated September 13, 1842, at seven months after date, by J. T. Hughes, for £7884 15s.; this bill was drawn upon the Cashier of the Bank of Australia, and accepted by W. H. Mackenzie, as such Cashier; it was discounted on the 27th October, 1842. The second is a bill for three months, dated December 2nd, 1842, drawn by J. T. Hughes, on the Bank of Australia, for £3000; it was discounted on the 5th December. The third bill is for three months, dated December 26th, 1842, and is drawn by J. T. Hughes, for £5000, upon the Bank of Australia; it was discounted December 29th, 1842. The fourth is for three months, dated January 16th, 1843, for £10,000, drawn by Hughes and Hosking upon the Bank of Australia; discounted the 16th January, 1843, the day of its date. The first bill is for three months, drawn by Hughes and Hosking upon the Bank of Australia, and dated the 16th January, 1843; the amount is £5000, and it was discounted on the 30th January, 1843. The sixth bill is for £8000, dated the 20th February, 1843, at fourteen days after date, drawn by Hughes and Hosking on the Bank of Australia, and discounted on the day of its date. The seventh bill is of the same amount, and drawn in the same manner, but is dated the 13th of February, 1843, and is at one month after date; this was also discounted on the 20th February, 1843. These bills are all accepted and made payable at the Bank of Australia by W. H. Mackenzie, as cashier of that Bank. The first bill spoken of is in favour of J. J. Peacock, and endorsed by him; the bill was brought to the Bank of Australasia by Mr. Mackenzie and Mr. Peacock together; scrip was given up for this bill to Mr. Mackenzie, as cashier of the Bank of Australia, on the bill being accepted; we had negotiated Hughes' bill in favour of Peacock with England, the scrip being attached as security for its payment, but the bill came back from England dishonoured, and the scrip along with it; we held the scrip till we got this bill; the proceeds of this bill was £7515 6s. 10d.; at the time this bill was brought by Mr. Mackenzie, we received a cheque from the last endorser, Peacock, for the whole amount of the proceeds. In the first instance the proceeds went to the credit of Peacock, but he appears to have given a cheque to Hughes for it, and the amount then went to the credit of the latter, to whom the discount of the bill was charged. The second bill was brought likewise by Mr. Mackenzie, who brought also a cheque of J. T. Hughes for £2600, which was paid, and the proceeds carried to the credit of the Bank of Australia, the balance of the bill being carried to the credit of Hughes. The next bill for £5000 was brought by Mackenzie, but I cannot say whether there was anybody with him; he brought a cheque of Hughes for £4852 1s., the entire proceeds of the bill, and the Bank of Australia was credited with the amount. The fourth bill for £10,000, was likewise brought by Mr. Mackenzie on the day of its date, and I think either Hughes or Hosking was with him; Mackenzie brought a cheque for £3000 on this occasion, which amount was placed to the credit of the Bank of Australia; on the settlement of that day the whole proceeds of the bill amounted to £9745 4s. 1d., and on the following Monday there were two cheques in favour of the Bank of Australia amounting to £4100. About two months afterwards there were two other cheques amounting together to £2200. The next bill for £5000 was likewise brought by Mr. Mackenzie with a cheque for the whole proceeds of the bill, the amount of which cheque was entered in the exchange-book to the credit of the Bank of Australia, to whom the difference was paid in specie. The next two bills of £8000 were brought together on the 20th of February, by Mr. Mackenzie, who brought a cheque for £14,600; the cheque was brought blank, and filled up for the above amount by Mr. Mackenzie; the amount of this cheque was entered in the exchange-book, and taken into account at the settlement on that day, the balance in favour of the Bank of Australia being paid in gold. The bill of September 13th became due on the 16th April, 1843, when there were two other bills of £10,000 and £5000 respectively, which also fell due, the total being £22,884 15s.; these bills were duly presented, and two days afterwards we received a Chairman's bill for their joint amount, the interest being paid in cash; at this time the account of the Bank was by the amount of the discount overdrawn to the extent of £549 11s. 9d., which they paid a fortnight afterwards in cash. The bill of 2nd December for £3000 became due on the 5th March, which being Sunday, it was presented on the previous day, when it was given up, and the amount charged in the Exchange Book. The bill of December 26th, for £5000, fell due on the 9th of March, and was disposed of in the same manner. The two bills of May 16, are those I have spoken of as included under one bill. The bill of 20th February fell due on the 9th of March, and was given up to the Bank of Australia upon the amount being entered in the Exchange Book, and the same was done with reference to the bill of the 13th February. On Monday, the 6th March, a bill for £36,400 was discounted, for the purpose of covering the balance due to us from the Bank of Australia upon the transactions of the week. The balance then due was £35,578 5s. 3d., which we ought to have received in gold, but took the bill for it in consequence of an arrangement with the Chairman of the Bank of Australia. The proceeds of the bill of £36,400 was £125 less than the amount of the above balance, and this £125 was carried on to the 13th March, the next settling day, when the balance in our favour was £23,960 12s. 7d. On that day three bills were given, two of £5000 each, and one of £15,000, making £25,000 in all. By these bills when discounted a balance was created in favour of the Bank of Australia of £368 13s. 8d. The bills produced are the bills referred to. The £15,000 bill is accepted by "W. H. Mackenzie, as Cashier of the Bank, as per minute of the Board of 28th February, 1843," one of the other bills is accepted in a similar manner; and the third is a promissory note, similarly drawn by Mackenzie. On the 20th March, there were two bills, for £13,800, and £10,000 respectively, one drawn by Mackenzie, as Cashier of the Bank of Australia, and the other accepted by him in a similar manner to cover the balance of that day. On the 27th March, 1842, a bill for £18,400, signed by Mackenzie, as per minute, &c., was discounted to cover the balance due to us, by which Bill a balance of £32,000 was left them. Two bills for £18,000 and £49,000 were in like manner discounted. On the 3rd April, and on the 20th April, we discounted Mr. Mackenzie's promissory note for £22,884 15s. The aggregate amount of these bills discounted subsequently to the 6th March to 20th April, inclusive, is £149,384 15s. The bills were all given up to the Bank of Australia on receiving new bills from the Chairman. The whole of the small bills were taken up by Mr. Macarthur's notes for £63,112 9s., £43,327 1s. 7d., £47,128 15s 11d., respectively, making together £153,567 16s. 6d. On the 30th October, the balance due to us was £154,480 19s. 11d,, of which sum £913 2s. 5d, was for past due interest. For this balance we received Mr. Norton's bill for £154,000, which, with payments by cheque, covered the nett balance due to us upon the amounts accruing by weekly exchanges, and in addition to Potts's and Dawson's bills. On the 20th February, 1843, the paper in our hands, of Hughes and Hosking, and J. T. Hughes, as makers or endorsers, not bearing the acceptance of the Bank of Australia, amounted to £68,673; of their direct liabilities as makers, we had at the same period £40,681 of paper. Up to the present time £12,480 of the last amount has been retired, leaving £28,201; no portion of the £12,480 was retired out of the advance of £154,000, nor has any of them been charged in the exchanges; the amount really taken up was principally paid, not by Hughes and Hosking but by the endorsers, but some small amount may have been taken up by the firm; Mr. Walker asked me to give up Potts's bill, to enable the Bank of Australia to prove, in order that having a mortgage for it, they might include it in their claim. I came up to the Insolvent Court, where I gave him the bill, and allowed him to prove on that understanding. We had no dividend upon this bill. With reference to Dawson's bill, an arrangement was made between Mr. Walker and myself that certain securities should be made over to a clerk in the Bank of Australasia for our mutual benefit, and Mr. Walker asked for the bill to prove upon it, as the Bank of Australia was answerable. We gave up the bill, and subsequently sent for it again. On the 5th of July, 1844, I received from Mr. Walker a cheque for the divided received upon this bill of £296 16s. 6d. [It was here admitted by the defendant's counsel that the Bank of Australia holds a mortgage on five acres of land at Elizabeth Bay, and six houses, the property of Mr. Potts, to secure payment of his (Potts's) bill. There have been pass-books between the two Banks from the 6th of March, 1843.

The cross-examination of Mr. Falconer was reserved by the defendant's counsel.

Major Smyth stated that he was desirous of correcting an error in his evidence of the previous day. His impression then was that he had been elected by ballot; he had confounded this circumstance with a previous election by ballot, at which he was a candidate; he was not present at the election, but his present impression was that he had not been elected by ballot.

David Bruce Hutchinson, Second Clerk of the Supreme Court: I produce from the Supreme Court Office a memorial filed on the 13th February, 1835. The signature is that of the late Chief Justice, who was a Judge at that time.

Theodore James Jaques: I produce memorials from the office of the Registrar-General, of the appointment of Mr. Norton as Chairman of the Bank of Australia, and likewise of the appointment of Mr. Breillat, who succeeded him in that capacity.

George P. F. Gregory: The memorial produced by the last witness was sworn before and filed with me on the 26th October, when I was Registrar of the Supreme Court, and was shortly afterwards transferred by me to the Registrar-General's Office. I know the signature produced to be that of Mr. Carter, who was Registrar-General at the period alluded to.

John Fairfax: I carry on the printing business in conjunction with Mr. Kemp, under the firm of Kemp and Fairfax; the report produced was printed from a manuscript received from the Bank of Australia; I believe from Mr. Walker; we have not got the manuscript now, and I believe it was sent with the proof to the Bank; I cannot say whether the manuscript was one continued writing; we have been paid by the Bank of Australia; the document produced is a copy of the report referred to.

The *Government Gazette* containing the official notification of the Royal assent to the Bank of Australia Act was then put in.

William Hamilton Hart: I am superintendent of the Bank of Australia, and as such have the supreme management in this colony of the affairs of that Corporation; Mr. Macarthur, Mr. Norton, Mr. Edye Manning, and Mr. Mackenzie, came as a deputation (according to their own statement) to our Bank in the first instance about the middle of January, 1843; Mr. Macarthur, the chairman, and Mr. Norton, both spoke; it was stated that the object of the deputation was to obtain pecuniary assistance to enable them to meet their liabilities—that they had valuable assets which were not immediately available, and that in the mean time they had pressing engagements to meet; I requested them to state what their position was, and was informed that the whole of their notes and deposits was £113,000; I remarked, that this could not be all their liabilities, as their bills could not be included of which we had some in our own Bank; it was then stated that their bills payable were almost all of Hughes and Hosking's, and they hoped a separate arrangement might be made for that firm with the Bank of Australasia; Mr. Norton stated that Hughes and Hosking's properties were worth £600,000, and this security would be given; I replied, that the Bank of Australasia would not take up the affairs of Hughes and Hosking; and I think my expression, with reference to the Bank's own liabilities was, that they must look their difficulties in the face, and let me see the whole of their liabilities; they agreed to prepare a statement of their affairs, which was done; on the 21st February, I received another deputation, consisting of the same parties, when a statement was produced, which has already been in evidence. They recognised the acceptances mentioned in the statement as being the acceptances of the Bank of Australia; and the bills mentioned in the same statements as liabilities created by guarantees, upon which the Bank was liable; I said to them that their liabilities exceeded £250,000, and that the Bank of Australasia was not prepared to go so far, and that they must have at least £200,000 to enable them to meet their engagements; I said, however, that we would advance £150,000 if they made up the £200,000 by assistance to be obtained elsewhere. It was then determined that the Union Bank should be applied to, and I agreed to communicate with Mr. Maclaren; I did so, and a meeting of myself and the same parties was held next day, at which Mr. Maclaren was present; Mr. Norton and Mr. Mackenzie were present, but I cannot say whether Mr. Macarthur was there; nothing was done at that meeting; Mr. Maclaren subsequently agreed to advance £60,000 upon a re-discount of paper belonging to the Bank of Australia, and we undertook to advance £150,000 upon the promissory notes of the Bank of Australia, bearing ten per cent. interest. On the 21st February, when that statement was brought, we had about £40,000 of Hughes and Hosking's and Hughes's paper in our hands, irrespective of the Bank of Australia, and besides endorsements; it was on the faith of their statement that we made the arrangement; when the loan was formally acceded to, I was desirous of ascertaining their exact position, and it was then that I received the statement marked No. 2, which was taken down in the course of a conversation after the loan had been actually agreed upon. There is a slight difference between the two statements, which is created by the transactions of the previous week. At that time we held notes of Hughes and Hosking to the amount of £25,000, and of J. T. Hughes to the amount of £9000, or thereabouts, irrespective of the Bank of Australia, making above £34,000. At the present time the amount is about £28,000. The statement of the 1st of February showed that the Bank of Australia was under obligations for Hughes and Hosking to the extent of £140,000, and I was informed that they had overdrawn their account to £60,000, making the whole advance £200,000; I then asked what were the remaining liabilities of Hughes and Hosking and J. T. Hughes over and above this amount, and was told that it was about £52,000, and that as Mr. Mackenzie had gone carefully over their books, the statement might be relied upon; I replied by asking how these statements could be relied upon, as the parties were known to be very irregular in their dealings; Mr. Norton replied, that they had been in difficulties some time, and that all their liabilities had probably come to the surface. To this I assented. I then said, that as the Bank had become so largely liable on account of Hughes and Hosking and of J. T. Hughes, I saw no other alternative than that of winding them up altogether, taking the property given for security, and paying the whole of their liabilities. This advice seemed to meet with approval as the only available course. Mr. Norton said, the securities held from Hughes and Hosking were, in his opinion, worth £600,000, and would produce half a million; as far as my information goes, the condition above alluded to has not been performed. I likewise stated, that if we gave assistance they must wind up their business as a Bank, and must contract no new engagements. This was acceded to, and they pledged themselves to call a meeting and recommend this course to the proprietors, It was stated that they were in urgent need of assistance. The acceptances in our hands of the Bank of Australia on account of Hughes and Hosking, on the 21st of February, amounted to £30,800 odd. I remember discounting two bills for £8000 each, but I do not recollect anything passing with myself about assistance, while the loan was pending. Those two bills, if discounted on the 25th, as is my impression, were discounted after the loan had been agreed upon; but if on the 20th, it was while the negotiations relative to the loan were still pending.

By Mr. DARVALL: It was stated by these gentlemen that they had valuable assets; the amount stated was £300,000 odd of bills receivable, many of which were secured by mortgages, but I did not require to see the securities. The loan negotiated with the Union Bank was by re-discounting £60,000 of bills; their coin was represented to be under £5000. I had never seen Mr. Mackenzie before this negotiation took place, and had never any acquaintance with either of the others, except Mr. Edye Manning. I have been present during the whole of the trial, and have observed a great deal of my correspondence placed in evidence. [Some discussion took place as to whether the defendant's counsel was entitled to ask whether part of the correspondence had not been kept back; and His HONOR ruled that in the first instance the proper question would be, whether any was written which had not been put in evidence, and if this was answered in the affirmative, it might be followed up by questions as to what became of the documents.] I have written letters during the progress of this transaction, which have not been put in, but I believe they relate exclusively to the breach of the 4th condition. Some of the letters in evidence were written before and some after those I now allude to. We have had no other transactions with the Bank of Australia. [A letter was here put in the hands of the witness.] The letter I now have in my hands was written by me. [The SOLICITOR-GENERAL having told the witness that he was not compelled to refresh his memory by looking at this letter, he declined doing so, and an argument took place as to whether he was or was not right in so doing. His HONOR decided in favour of the course pursued by Mr. Darvall, on the ground, that if by reading the document, the witness's memory was so refreshed as to enable him to recollect the transaction, his evidence on this point would be admissible; but if he was not certain on that point, and merely stated his impression of its correctness, the defendant must then put the letter itself in evidence.] Having read that letter, I recollect offers of further assistance, but they were in writing. I remember no verbal conversation upon the point—the answer was also in writing; no further advance however was made. At the present time there are £28,000 of Hughes and Hosking's and J. T. Hughes's acceptances unpaid, but we have securities which have been obtained from the endorsers. We have not security for the whole of the debt, but upon some of the bills; I cannot say that we have the security of additional names; I think, however, that there have been no renewals. By the book produced I find that the acceptances and other liabilities, direct and indirect, of Hughes and Hosking, J. T. Hughes, and J. Hosking, on the 27th of February, 1843, was about £125,000, for which we held no security. We were informed, during the negotiations, that Hughes and Hosking had given security to the Bank of Australia for the amount of their liabilities, but I do not remember the precise amount; I believe it was said that they were secured for the amount of their overdrawn account of £60,000; we never made any enquiry as to this security, nor were we asked to do so. We made a stipulation that no further transfer of shares should be made without our consent. [The witness then proceeded to refer to the names of the endorsers, by which it appeared that fifteen of the number had since become insolvent, being nearly the whole.] We hold about £28,000 of the paper still; a portion of this paper is secured, to the extent of £20,000, being held from one individual. These same bills, upon which the security is now held, were in existence on the 27th of February, being renewals of bills given before I joined the Bank; the security now held has been obtained at different times; we got no security direct from Hughes and Hosking, but I know that the endorsers who made the arrangements with us were furnished with the means of doing so by Hughes and Hosking; there was a distinct understanding with the deputation that the Bank of Australia should charge itself with the liquidation of all Hughes and Hosking's liabilities, and should take their properties and wind up their affairs; I was assured by the gentlemen composing the deputation, that if this arrangement was carried out, Hughes and Hosking would assign their property to the Bank; this assurance was in the presence of Mr. Falconer; I have no doubt that there had been previous communication between Mr. Falconer and Mr. Mackenzie relative to this loan before I was applied to; I was told by Mr. Falconer of the first step to these negotiations, which was an application by Mr. Mackenzie on the 12th or 15th of January, for an advance of £60,000. This information I received by means of a memorandum, which explained what was wanted. It was not part of the understanding between us that the Bank should incorporate and carry on the concerns of Hughes and Hosking, J. T. Hughes, and John Hosking, with their own, but it was understood that they should wind all up together. It was for this purpose that I understood the sum of £250,000 was required, of which £120,000 might be immediately necessary, the rest being spread over a certain number of months. It was part of the memorandum furnished by myself to Mr. Maclaren, that the Bank of Australia should carry on the concerns of Hughes and Hosking, and of the individual partners of that firm contemporaneously with their own. I had been before requested to communicate with Mr. Maclaren upon this subject, and I read the memorandum to the gentlemen of the deputation before I submitted it to Mr. Maclaren. It was my understanding, and I believe the understanding of all, that the Bank of Australia was to undertake the sole management and control of the affairs of Hughes and Hosking, and the individual partners in the firm, as a trust, confided to it, not for their own benefit, but for the general benefit of the creditors and of these parties generally. The Bank of Australia ceased to carry on its banking operations very shortly after this. I remember urging upon the deputation that I could only consent to assist the Bank of Australia upon condition they should identify the affairs of Hughes and Hosking with theirs, and as their trustees wind up their affairs. It is the first time I have filled a situation of the description I now hold; I have not been a banker before; I have been a merchant and agent. The re-discounts by the Union Bank took place at the same time as our advances to the Bank of Australia; I do not know from Mr. Falconer or in any other manner, except from printed statements, the present position of Hughes and Hosking's account with the Bank of Australia; I cannot remember who spoke of the overdrawn account of £60,000; I believe it was Mr. Norton; it was at the meeting of the 21st of February; he said that the account had been overdrawn to that amount; I read all the returns made under the Act of Council, but I could not check this statement by reference to such returns; I took no steps to ascertain the correctness of the statement; the large bill sued upon represents in a consolidated form all previous transactions except the bills of Dawson and Potts; this bill was discounted in the usual course of business, it was carried to the credit of the Bank of Australia, and the proceeds were applied to the liquidation of what was due to us upon all previous transactions, except the two bills before referred to. I gave no instruction to prove upon the estates of Hughes and Hosking, but Mr. Falconer told me that he had proved for £15,000. It was by my instructions that the £154,000 note was discounted in the usual course of business; the old account was closed by a transfer to the new account; both accounts went on together for some time at the request of Mr. Walker; the cheque of Mr. Norton was, I conceive, sufficient authority for closing the old account, and placing the proceeds of the bill to the new account.

By the SOLICITOR-GENERAL: The letter produced is the one which I received from Mr. Falconer, as having been obtained from Mr. Mackenzie, but it was never acted upon. [Letter read.] In the amount I have spoken of as that for which Hughes and Hosking were liable, as last endorsers, &c., the acceptances of the Bank of Australia were included; at the time of the discussion with the deputation, the intermediate endorsements of Hughes and Hosking were not taken into consideration, and were not within the agreement as liabilities to be covered by the Bank of Australia; the amount of direct liabilities of Hughes and Hosking, which were stipulated should be covered by the Bank of Australia, was £40,000, and such loss as might accrue from the endorsements, although we did not expect there would be any; the whole amount to be covered, including the £40,000, was £53,000, although it was understood that there might be other amounts of endorsements which they would have to cover; the credit of those who have since become insolvent, or most of them, was good at the time of the negotiation; we considered the acceptors or makers of these notes to be good generally, and consequently that there would be little fear of having to call upon Hughes and Hosking; according to the statement of the deputation they expected to get £70,000 from Hughes and Hosking in the course of the year, and £75,000 from their own bills, making together £145,000; the real transaction with reference to the £154,000 note was, that it was merely placed to their credit for the amount, without any deduction for discount.

After some discussion between the counsel on either side, Mr. WINDEYER agreed to wave his cross-examination of Mr. Falconer, and to consider all the documents as read, provided the Court was adjourned till one o'clock on Friday, in order that there might be time for consultation as to the defence. This was acceded to by his HONOR, and the plaintiff's case was closed.

Court adjourned till one o'clock on Friday,

FRIDAY.—EIGHTH DAY.

The SOLICITOR-GENERAL: May it please your Honor,—I have some documents to be marked on the part of the plaintiff, and propose to call a witness, with the consent of my learned friend, a clerk, to calculate the interest.

Mr. WINDEYER: The Jury can calculate the interest; but I will admit any amount my friend states as the interest.

The SOLICITOR-GENERAL: It is usual to call a witness to save the Jury the trouble. The amount of interest due to the 3rd of April, upon the note for £154,000, would be £21,939 14s. 6d.

A Juryman: From what date?

The SOLICITOR-GENERAL: From the date of the bills becoming due, the 30th of October, 1843, to yesterday, the 3rd of April. Then the interest on Potts's bill, from the day of its maturity, the 10th of July, 1843, to yesterday, is £602 11s. 3d.; and on Dawson's bill, from the 18th of June, 1843, after deducting a payment made from the insolvent estate, £489 4s. 9d.,—total amount, £23,031 10s. 6d.

A Juryman: At eight per cent.?

The SOLICITOR-GENERAL: No; at ten per cent., the interest agreed upon at the time of the loan, according to the minute given in evidence. I may also mention, gentlemen, that according to this calculation, the daily interest is £43 10s. 9d. upon the whole amount.

Mr. WINDEYER: May it please your Honor—Gentlemen of the Jury,—I am not at all surprised that my learned friend should have forgotten to to prove the interest, as after the evidence we had last night, he must have had some doubts whether he should ever get the principal. However, I acknowledge that he has abundance of other excuses, for with this mountain of evidence which he has piled up before you, it is not at all a matter of astonishment that he has omitted a little point of that kind—still, I think, having passed it over, he might have saved himself the trouble he has now taken to make this statement, which, after all, is erroneous, for this bill for the larger amount is made payable on demand, and there being no demand proved before the action was brought, he had no right to calculate from a particular date. I will not apologise to you for the great length of time which I design to occupy your attention, because it would be an insult to your understandings to pretend that a case of this kind could be disposed of in one or two days, and it is impossible that I could leave this mass of evidence in its present undigested state before you, even if, at the close of my address, I may not think it needful to increase its amount. I dare say, gentlemen, that you are heartily sick and tired of the case, and that we have been, in many instances, discussing points, the bearing of which you have not been able to see; trusting, however, to your sense of duty, in dealing with this case, I shall at once proceed to enter upon it. I concede to my learned friend that this is a case of the utmost importance, not only as regards the amount at stake, which is perhaps the largest ever sued for in any Court of Justice, certainly in this country, or in any British colony, but also as regards the effect to be produced by the result on the country, of which we are members. In order to judge of the importance of this suit to the parties immediately interested, you may look to the demand alone, but to estimate the extent of its importance to the colony, you must compare the demand claimed with the population and revenue. Here is, according to my learned friend's statement, nearly £200,000 at stake; to have a correspondent suit at home there must be about twenty-four millions at stake, comparing the population of the two countries, or comparing the revenues, about thirty millions. Therefore, there is no denying the importance of the suit. The extent of the interest to those more immediately concerned is not, however, at first sight seen. There appears by the deed of settlement to be 170 proprietors; out of this suit, if my learned friend should succeed, may arise 170 other actions, by writ of *scire facias*. The Court has lately made a rule that no writ of *scire facias* should include more than four persons, so that if this suit succeed there will no doubt be as many writs of *scire facias* as 170, divided by four, will yield. I suppose each of these actions would occupy about as long as the last writ of *scire facias* tried, which, I believe, although not quite so long as the present case, was almost a week; so that this suit opens rather agreeable prospects in these desolate times to my learned friends and myself. The suit itself is by no means to be despised, I must confess; it is quite cheering in many points of view, but when I see the other actions it may lead to, if my friends should be so fortunate as to succeed, there is no saying what will be the result to us. But, however difficult it may be to calculate our gains in such an event as that, the calculation of loss to the community might be put down in very few words; for I take it, that the process I have mentioned could not go on without involving the community in utter ruin. Or, supposing that Mr. Hart, with that wisdom and liberality which he, no doubt, would think it requisite to exercise in such a case, were to say "Oh, do not be afraid, all the twelve apostles have been picked out—we will draw it very gently from you." We cannot doubt that before proceedings could be brought to a head, the parties, including the apostles, we have heard, are to be selected as the first victims, would take some steps to save themselves from what they consider an unrighteous demand. The result, therefore, would be the extirpation of many of the most respectable families in the colony, and the consequent ruin of all the interests that may be dependent upon them. My learned friend dwelt upon the number of persons interested in the Bank of Australia; but, on the other hand, the number Mr. Hart must have enlisted on his side, must be considered; and I can assure you, that it was with no little difficulty we struck out the twelve names forming the present Jury. For how was it possible to select, from a panel of thirty-six, twelve men entirely uninfluenced, unbiassed by such an institution as the Bank of Australasia? It was impossible for us to know all the proprietors—it was impossible for us to know all the customers—it was impossible for us to know who Mr. Hart had under his power in the way of discounts; still more impossible, in such a community as this, was it to know who were connected with other institutions who might fancy their interests were directly or indirectly mixed up in this present question. No doubt the whole community are vastly interested, but the only effect of that consideration ought to be to induce you to consider very carefully indeed, before you pronounce your verdict one way or the other. Perhaps it will be well before going to the main body of the case to allude to one word my learned friend dwelt very much upon in his speech—it is the ugly word "repudiation." As the public have looked at those who have adopted the word in America with great indignation, it was a word used no doubt with the purpose of assimilating the conduct of the proprietors of the Bank of Australia to that of the different States of America who had refused to pay their debts. But it is was utterly unfair on the part of the learned Solicitor-General to use the word with such a purpose. The repudiation practised in America was no doubt odious, because there the parties repudiated a debt which they acknowledged to exist; but our plea is, that no debt ever existed at all against us. In the case of Huxtable *v.* The State of Illinois, where the agents of a bank had done some particular act with regard to the issue of bonds and cutting off coupons contrary to their duty as agents, the Vice Chancellor, in the report of the case which has recently reached the colony stated, that although it might be in one sense repudiation for the State of Illinois to refuse to be bound by the acts of their agents, it was not a reproachful sense if those acts were beyond their authority. Therefore I shall not reject the word, but reject the meaning that my learned friend has put upon it; and although the word repudiation may be used over and over again in the course of these proceedings, I trust it will be borne in mind that the Bank of Australia does not repudiate any debt, but utterly denies the existence of any debt at all. This defence is not set up by any abstract body—by some one who is to be represented as the Bank of Australia, it is set up by the proprietary at large, and although my learned friend has wished to draw a distinction between them and the Directors, and to cast the blame upon the agents and not upon the proprietary, the fact is that it is not the agents who are sued or who defend—if the agents had been sued, no doubt my learned friend might have been indignant against them, but at present it is the 170 proprietors, whose agents have misconducted themselves in the way you have heard stated, whose rights are in question. To see that they are not in the same position that the Directors are, you have only to look at the deed, in which you will find—and indeed without referring to the deed it is clear that there must be in the proprietary persons altogether unconnected with trade—clergymen, half-pay officers, widows, orphans—who all thought that by investing their money in this Bank they were securing a certain safe income, depositing their money to be managed in a certain specified manner, under certain rules, but who never dreamed that their agents would do more than was set down for them, or that they could be rendered liable for acts performed by their agents beyond what they were commissioned to do. My learned friend next enlarged upon what he said was the mode in which we had attempted to mislead the Jury—he stated that there had been some garbled correspondence, put forth among a particular body of the community—what that particular body was, we shall have to see by and by; and that his bank had done nothing of the kind—they had put forth no statements. However, it came out in the evidence of Mr. Falconer, and was extracted with some difficulty, that the Bank of Australasia had put forth statements, under the seal of secrecy certainly, but it was one of those secrets that could not be kept, and who can doubt that there was just as much likelihood of their statements getting abroad, though put forth under the seal of secrecy, as ours? But the sting of this is gone, from the learned Solicitor-General failing to prove, as he said he would, the falsity of our representations. My learned friend's avowed object in making this statement to you, puts me in mind of a story of a gentleman who wanted to gain his cause, and resorted to the following expedient: The Judge who tried it was a gentleman of particularly sensitive character upon the subject of his independence and impartiality. The gentleman got a friend of his to go to the Judge and pretend to influence him on the other side. The effect of that was precisely what my learned friend says is to be the effect of our alleged attempt to influence you, namely, to excite indignation against the party so appearing to act. By an assertion of our intention to mislead, the Solicitor-General is to gain the advantage of your indignation, but without showing you that we have issued any garbled correspondence whatever. But then he says; Gentlemen of the Jury, I entreat you to bear in mind the broad facts of the case; no doubt there will be attempts made to throw in a vast number of irrelevant matters, but you must not be embarrassed by the intricacies of evidence.

The SOLICITOR-GENERAL: I did not say intricacies of evidence.

Mr. WINDEYER: It is so reported, and I have so got it down, "you are to look to the broad facts of the case." Now, I have intimated in the course of the trial that I did not care a straw about his broad facts; —the broad facts as my learned friend states them are, that we have had the money and have not paid it to the Bank of Australasia. Well, gentlemen, what if it were so? If even in substance I admitted that, I will show beyond a doubt, and His HONOR will not gainsay it, that it will not signify a straw if we have had the money—if the proprietary have put it into their pockets and paid off their debts with it—even if against the understanding which the parties came to at the time: but you will find when you come to view the facts buried under my friend's mountain, that they are not at all such as my learned friend stated, but quite different.

The record contains four demands,—the two on the two small notes, that on

the money counts, and that on the large note. I will dispose of the three first very shortly, because I do not wish them to embarrass the main case, which will turn upon the loan, and the large note now epresenting it. Many principles that I shall have to refer to with regard to the large note, will equally apply to the small notes; but I shall not look to them again, in order to avoid confusion. Now with regard to the small notes, I candidly and at once admit that the Bank of Australia ought to pay them; they came into the hands of the Bank of Australasia in the regular course of banking business; they ought to be paid, and in point of fact, you cannot doubt, now that I have made that admission, that they would have been paid but for some reason much more cogent than the mere advantage to be obtained by withholding of this £4000, or whatever it may be, by the Bank. It is not difficult to see upon the record what must be the reason that they have not been paid; it is, that they are so much mixed up in the principle of the defence to the others, that if we had paid this amount into Court we should have broken down the defence for the other, because the defence that applies to them, applies to the large note. We are ready to pay them, but the plaintiff stuffs them into the record evidently, for my learned friend so put it, to induce a belief in the public mind that these also were repudiated by the Bank. He said, "you may judge what the object of the Bank is, when you find that even the small notes which have passed in the regular course of banking business are repudiated;" so wishing to prejudice the defence upon the large note, by referring to our conduct with regard to the small notes. We could not, the action being brought upon them, have paid these without admitting the principle as applied to all. But our defence in point of law, whatever may be done with the notes hereafter, is an unanswerable one, and I am sure His Honor will so tell you. We are not the makers of these notes; the Bank of Australia is charged on them as the endorser. There are two defences which arise upon that, and which are pleaded; as endorser, the bank was entitled to have a regular notice of dishonour; and also, to charge the proprietary of the Bank, the note must be endorsed by some authorised person *for them*, and that must appear upon the note itself, for there can be no parol explanation of a written obligation. It would be monstrous for any one taking a note passing from hand to hand, to take it for anything beyond what appears upon the face of it. Now what appears on the face of this note to charge us? "Pay Bank of Australasia or order, H. H. Macarthur, Chairman of the Bank of Australia;" that is the endorsement. Now His Honor will tell you that the cases have decided that when a man, after his signature, puts Secretary or Chairman, or anything of that kind, it is a mere matter of description, and it does not signify that he accepts for and on behalf of the body named. The proper mode of acceptance or endorsing is shown by Mr. Falconer, whose signature follows "for and on behalf of the Bank of Australasia, C. Falconer, Manager;" but that is not the mode adopted by Mr. Macarthur. He has endorsed these notes in a way to render himself liable—beyond a doubt he is the person liable for these notes—and no evidence can be admitted to prove that when he signed the note in that way another party was meant who would pay it. My learned friend, quite conscious of that, endeavoured to confuse the matter, and attempted to show that Mr. Macarthur was authorised by the Directors to do as he had done. I quite admit that, but what is the authority? It is the authority which any partner would have in an ordinary partnership; the authority which any partner would have in an ordinary partnership would be to sign the name of the firm or his own name for the firm, expressing it to be for the firm. That is the authority given to Mr. Macarthur, viz., to bind the Bank by any notes he may sign for and on behalf of the Bank. So that he is given by that minute the authority which any partner in an ordinary partnership would have had. What is that authority? The authority to sign in the name of the firm—and any other name will not bind the firm, let the variance be ever so trivial. A very short case, which I will take the liberty to cite, will, I have no doubt, satisfy you upon that point. Kirk *v.* Blurton and Charles Habershon, Masson and Welby, p. 284. "The declaration stated that the defendant by and under the name, style, and firm of John Blurton and Co., on the 12th March, 1841, made their bill of exchange in writing, and directed the same to Messrs. Smith, Payne, and Smith, and thereby required them to pay to the order of the defendants £50, two months after date, which period had then elapsed, and the defendants then endorsed the bill to William Unwin, who endorsed it to the Andrew Duncan, who endorsed it to the plaintiff. Breach in non-payment by Messrs. Smith, Payne, and Smith, of which the defendant had due notice. The defendant Habershon allowed judgment to go by default. The defendant Blurton pleaded four pleas: 1st. That he did not make the bill. 2ndly. That he did not endorse it. 3rdly. That Blurton and Habershon were partners as printers, and that Habershon made and endorsed the bill in fraud of his partner for purposes not connected with the partnership, and that the bill was endorsed by him to Unwin, &c., with notice of the fraud. And 4thly. That the bill was made and endorsed without consideration." The bill was produced in evidence and was as follows:—

"Sheffield, May 12th, 1841.

"Two months after date pay to our order £50 for value received.

"John Blurton and Co.

"At Messrs. Smith, Payne, and Smith, Bankers, London.

"Endorsed, John Blurton and Co., William Unwin, Andrew Duncan."

The bill was drawn and endorsed by Habershon. It appeared that the defendants carried on business as printers at Sheffield, under the name of John Blurton, that being the name over the door. A witness was called who stated that the firm had been in the habit of drawing bills, and that he had seen them, but could not take upon himself to say whether they were in the name of "John Blurton," or "John Blurton and Co." Baron Alderson said, "The Court do not entertain any doubt as to the principle of law applicable to this case. One partner can bind his co-partners only to the extent of the authority generally, to enable them to carry on the partnership business together. The true principle is that which has been stated by Mr. Cresswell," namely, "that there is no implied authority to any partner to bind the firm by his acceptance of a bill, except in the true style of the partnership." Now the true style of our partnership, if it is to be looked at in that way, is "the Bank of Australia." This is not an endorsement by the Bank of Australia, nor does it purport to be an endorsement for and on account of the Bank of Australia, therefore the Bank is not in any way bound by it, as they might have been if it had been endorsed as Mr. Falconer endorsed his for the Bank of Australasia. It appears that the name of John Blurton was over the door; and if the bill had been signed in the name of John Blurton, the parties would have been bound. "A witness was called who stated that the firm had been in the habit of drawing bills, and that he had seen them; but he could not take upon himself to say whether they were in the name of 'John Blurton' or 'John Blurton and Co.'" And the Court decided the case in the way I have stated. But there is another point which I shall leave to you, under His Honor's direction, although I shall not much dwell upon it, for these small bills will be swept away by the main body of the case, and also by the case which I have mentioned to you; that in point of fact the plaintiffs have not proved their notice of dishonour. They have proved that a notice of dishonour was written and addressed to Mr. Macarthur, Chairman of the Bank of Australia,—that was very proper, Mr. Macarthur was the endorser and the Chairman of the Bank of Australia; and if that notice had reached him in time, and the bill had been good and the endorsement good, the defendants would have been liable. Now, the first named bill was due on the 10th of July, but where is the evidence that the notice reached Mr. Macarthur at all, still less on the 10th of July. The evidence is that the notices of both notes so written was enclosed in an envelope to Mr. Walker, and they had proved that Mr. Walker would receive the letter in the ordinary course. But what of that? Suppose any person were to address a notice of dishonour intended for you, enclosed in an envelope, addressed to your servant, to prove that your servant had received that letter would not be enough; he must go on to prove that the servant opened the letter and delivered the enclosed notice to you. This was a notice to Mr. Macarthur; they simply show that this notice, which was to bind Mr. Macarthur, and through him the Bank of Australia, was sent to Mr. Walker, and have not shown that it reached Mr. Macarthur at all However, that is more of a technical point than the other, and I do not mean to press it. These are the legal defences we make with respect to the small notes.

The third demand is on the money counts, which I shall dispose of in a few words. Under these counts they seek to charge us with certain items which they have put *seriatim* in their particulars of demand. These are what they must charge us with. We will admit that they have made out their particulars of demand fully; but then, on the other hand, the very same evidence that we admit as making out the particulars of demand proves that we have paid it off. After proving the items on the debit side of the account, they also showed that there were various sums to our credit, leaving a balance of £270 in our favour. Therefore they have nothing to demand on that score—that is wiped off. Then the balance in our favour is transferred to the new account, all without any proper authority, though they say it was in the proper course of business, and the big bill is transferred to the new account, and there entered on both sides, so that nothing there appears to our debit. But the big bill is not in any way in question in that shape, and I will only add for his Honor's assistance hereafter, if necessary, the rule of law for disposing of these demands under the money counts as laid down in Clayton's case, 1st Merivale's Reports, Devaynes *v.* Noble, p. 608. "In cases as of a banking account, where there has been a continuation of dealings, the appropriation (in the absence of express declaration) can only be made on the ground of presumption, arising from the priority of receipts and payments. If any other appropriation is to be made, it is incumbent on the creditor to declare his intention at the time of payment." Neither banker nor customer ever think of saying this draft is to be placed to the account of the £500 paid in on Monday, and this other to the £500 paid in on Tuesday. There is a fund of £1000 to be drawn upon, and that is enough. In such a case there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably it is the sum first paid in, that is first drawn out. It is the first item on the debit side of the accounts that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has, or has not, been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made? You are not to take the account backwards and strike the balance at the head instead of at the foot of it. A man's banker breaks owing him on the whole account a balance of £1000, it would surprise one to hear the customer say, 'I have been fortunate enough to draw out all that I paid in during the last four years, but there is £1000 which I paid in five years ago that I hold myself never to have drawn one; and therefore if I can find anybody who was answerable for the debts of the banking house, such as they stood five years ago, I have a right to say that it is that specific sum which is still due to me, and not the £1000 that I paid in last week.'" So it is equally true that my learned friends cannot go backwards in the account up to the time when they say they lent this money, because the banker no more than the customer can pretend to go back to get rid of large intermediate payments, by entering the credits on the other side of the account. My learned friend also reminds me that the evidence expressly was, that all the previous matters were wiped off and consolidated in this note. I quite admit, however, that my friends have a right, if they had any counts under which they could do it, and there were no pleas to meet them, to recover on the original consideration. I will only add with respect to the small notes, that not to look to the mere form of the matter (and indeed my whole case will consist in calling your attention to the substance and not to the form, though as regards the pleadings, the technical form of the defence, you will be bound to look even to forms) but in point of equity, though it is really of little importance as regards the determination of these issues, there are securities held for these small notes by both the Banks.

Solicitor-General: Not so, there is one for £500.

Mr. Windeyer: It was clearly proved by the evidence of Mr. Falconer, that there was a direct transaction between Mr. Potts and the Bank with respect to securing his note, and the valuable property at Potts's Point was given in pledge for it; and as regards the other note, there is a security existing for the benefit of whichever Bank is entitled to it. However, that will not affect the actual issue, and the actual issue is, whether a proper notice of dishonour has been given, and whether this endorsement was made for and on behalf of the Bank of Australia. You have only to look at the note to see that it was made by H. Macarthur, and any stranger taking the note could only look to him for it.

We now come to the main question.—My learned friend was pleased, drawing somewhat upon his imagination I am afraid, to speak about the 20 per cent. that our Bank had divided. I do not know whether he was also speaking of his own Bank; but I can easily imagine that if the Bank of Australia has divided its per cents., the Bank of Australasia, which has been carrying on business at the same time, must have done something of the same nature, and that this corporation had at this rate made much more out of the colony than the whole amount of capital embarked in it; so that if this case should go against them, they will still, on a balance of profit and loss, not be so very badly off. But my learned friend was not content with stating our dividends as he supposed them to exist, or as his own exist, but he took occasion to make a lamentation upon the improper conduct of the directors. Now, gentlemen, it is a very old maxim, that no man suddenly becomes wicked—he is led on from one false step to another—he is seduced by slow degrees; and if my learned friend had gone perhaps only one step further backward in the history of the Bank of Australia, he might have found the true source of the present action. By a report put in by my learned friend,—I shall be very careful to refer to the precise evidence given,- dated 7th September, 1843, it is shown that at that time three of the gentlemen who are named in that report, and whom I have proved by several witnesses to have been directors of the Bank, had at that time got into their possession, out of our capital of £220,000, no less a sum than £133,286! These directors—these agents of ours—these agents of ours by whose acts we are to be bound—by my learned friend's evidence, had got hold of £133,286. You may refer to the report, and will there see the three names. Well, these gentlemen, it also appears, by another part of the evidence, have failed; and it is not an unfair conclusion to arrive at, that they were not the first-rate merchants of Sydney, but may be put down as second or third rate. Whether these gentlemen obtained this money through Mr. Mackenzie alone, as did happen in a case before the Court, or through the negligence of their brother directors, is not material, because the effect would be precisely the same. But what was the effect? They had got this money, more than half the capital of the bank, and in that state of things there came to the bank for relief two really first-rate merchants, men of the most extensive transactions, whose concerns affected the whole trading interests of the colony, whose fall it was feared would involve the community in ruin, and whose failure was held even in its mitigated form to be the main cause of the distress we suffered some two years ago; they came, and what could this board of directors, three of whom had divided £133,000 amongst themselves do? If they had refused Messrs. Hughes and Hosking the accommodation they asked for, Messrs. Hughes and Hosking would have said, "It is of no use to tell us that it is contrary to your authority, you have done the same thing for yourselves, you have got £133,000 from the Bank, and if you do not assist us, we will expose you." They were compelled therefore to make an advance of money, and whether this was addressed to Mr. Mackenzie or to the directors it was equally imperative,—they could not help themselves. I care not whether there was any direct minute of the board authorising the previous advances made by Mr. Mackenzie, but the evidence of Mr. Macarthur is, that he knows of no authority having been given to Mr. Mackenzie. The plaintiffs have utterly failed to show any authority to Mr. Mackenzie before that of the 28th February; and we have it in evidence that he, before that date, took upon himself to do what he afterwards did with some show of authority. He was compelled, by the previous breach of duty that he and the other directors had committed, to violate his trust for Messrs Hughes and Hosking, and thereby involved the Bank to the immense amount that Mr. Hart has described. That is our state at the time this loan is made. It was thus that our agents had recently, without authority, for none is shown, involved the bank to half as much again as the amount of its capital. To these directors alone had gone £133,000, independently of what they had become liable for, according to Mr. Hart's evidence, on account of Messrs. Hughes and Hosking. I will admit—and I do it cheerfully, because although I mention no names, it is perhaps impossible in the nature of things that you should not know who the parties are,—I admit, I say, that I believe the parties concerned in these transactions thought there was no danger in them—that there was no hazard—that it was merely a momentary assistance, and that their property would be sure to cover the sums they had received if they were called upon for payment, and that they may even have lodged valuable security in the Bank That, as regards their consciences, is a valuable fact—it is a fact that relieves them from the notion of designing what ultimately took place. But that fact does not alter the nature of the act that resulted in consequences so disastrous. The question must be decided upon other grounds. We are not to enquire whether the speculation of the directors was a lucky hit or an unlucky hit, but whether they did that which they had no power to do. To those gentlemen who were concerned in this transaction I am willing to concede what I was willing to concede to Mr. Norton when he told Mr Hart he believed that the property of Messrs. Hughes and Hosking was worth half a million of money. I am willing to concede that they formed similar estimates of their own property; and I think it would have been only charitable of my learned friend if, instead of making that a ground for charging Mr. Norton with an attempt to delude or deceive—

The Solicitor-General: I never said so.

Mr. Windeyer: Well, I withdraw that. Then if Mr. Norton believed in his estimate, and Mr. Hart believed in it, both their minds must have been impressed with the notion that they ran no risk. As to whether any of the other directors of the Bank of Australia obtained money in the same way as did the three alluded to there is no evidence; but I would at once say in justice to the other gentlemen who have been named as directors, that I do believe there is no manner of ground for imputing to them that in the votes they gave any of them were actuated by mercenary or improper motives. Indeed it does not appear that any non-trading director had any money from the bank at all. Therefore in what they have done, whether in a minority, a majority, or equal with the directors that applied the funds to their own purposes in the direction room, I am willing to think they were ignorant—that they were misled; they had confidence in persons in whom they should not have had confidence—and that may be the amount of the error into which they fell, an error, the result of which has been so unfortunate. Leaving the origin of the excess of authority which Mr. Mackenzie had engaged himself, let us see what, according to Mr. Hart's evidence, was the state to which we were reduced by it at the time of the loan. According to the statement called No. 1, marked R. R., produced by Mr. Falconer, and laid before the meeting of the Directors of the two Banks on the 21st of February, 1843, and from which statement No. 2 is said not materially to differ—this is the state of our affairs at the time of the loan: It appears that our liabilities on our deposits and notes were £113,000, and that there was but £5000 in hand to meet them. That was all that was at first put forth, but Mr. Hart said, "These cannot be all the liabilities, I know of more myself, we hold some in our bank." Our directors then said there were others, chiefly entered into on account of Messrs. Hughes and Hosking, and afterwards upon Mr. Hart's request they produced the other particulars contained in statement No. 1. From this it appeared that their liabilities on account of Hughes and Hosking amounted to about £150,000, including those in Mr. Hart's hands. It also appears from Mr. Hart's statement, and as there is no evidence in figures, which is most necessary in a case of this kind, to contradict it, I shall be bound to take it—that it was mentioned at that meeting that the bank had an overdrawn account with Hughes and Hosking to the amount of £60,000. That I think possibly might have been a mistake—instead of overdrawn account it might have been overdue bills; but at present that will not signify. I must take it as being the state of things, that Messrs. Hughes and Hosking had overdrawn their account to the amount of £60,000. Now, what is the state of the Bank of Australasia? The Bank of Australasia now appears, by the last piece of evidence we got yesterday, from Mr. Hart, at the time of this loan, to have held paper with Hughes and Hosking's names upon it to the amount of £125,000. If you recollect, gentlemen, we got Mr. Hart to give us two sets of figures, one showing Hughes and Hosking's account just previous to the loan, and one showing what it was at the time of the loan. There was no great difference between these, except that in the second batch of figures one item was increased from about £30,000 to upwards of £50,000, he then including in the direct liabilities the £46,000 on which the acceptances of the cashier of the Bank of Australia had been placed, and by taking the second column of figures, the paper in his bank bearing the names of Hughes and Hosking and J. T. Hughes separately, was shown to amount to £125,000—for this paper he tells us also he had no security. Now, whatever was the amount of our account, it seems we had some security for it, as much, I suppose, as was thought sufficient at that time, but Mr. Hart had none—he had paper in his bank amounting to £125,000 of these parties, for which he had no security at all! In the statement, the liabilities of the Bank of Australia, on account of Hughes and Hosking, amounted altogether to £150,000, but in that was included the £46,000 that Mr. Hart said we were liable for, and upon which, for the purpose of making out our state of accounts, I have hitherto so spoken of. But in reality we were not liable upon that £46,000. These were acceptances of the cashier before the passing of the minute of the board of directors giving him authority to accept. When these agents of the Bank went to borrow money to get themselves out of the scrape into which they had got by their violation of duty, I care not if they spoke, as Mr. Hart said they did, of these, as being liabilities of the Bank of Australia. Very possibly these gentlemen thought they were such; I think it is very likely they did imagine these were liabilities of the Bank of Australia, and that they spoke of them as such; but that is not the question; the question is, whether they were so in reality—whether this £46,000 could have been recovered, in point of law, then or not. In order to judge of the then state of accounts, you must not, gentlemen, consider that afterwards Mr. Mackenzie got authority—that on the 29th of March the directors passed a retrospective resolution. The effect of that, and whether they could, on the 29th of March, bind the Bank by the retrospective minute that is put in, are separate questions, which I shall consider by and by, under the head of ratification. For my present purpose it is sufficient to show that at the time of the loan the authority to Mackenzie did not exist. The loan was made between the 21st and the 27th of February; at that time Mackenzie had no authority at all, and therefore, at that time the Bank was in a position to say that it was not liable for this £46,000. There are various other large sums spoken of as liabilities of the Bank of Australia throughout the reports put in by my learned friends, and called, therein marked, cheques, guarantees, &c., but payment of which we might have resisted, as it appears we did resist, and successfully a claim founded upon one of a similar nature by Mr. A. B. Smith. Supposing, however, that we only struck off the sum of £46,000 from the £150,000 spoken of as our liabilities on account of Hughes and Hosking, and the vouchers for which £4000 being in evidence, we can clearly see Mr. Hart could not have recovered, there remains only about £104,000 as our apparent liability for that firm, whilst Mr. Hart admits that he held £125,000 of Hughes and Hosking's and J. T. Hughes's paper in his hand, without any security at all. It appears, therefore, that at the time of the loan, the Bank of Australasia and ourselves were not far from equal as regarded the amount depending on Hughes and Hosking's solvency. Then, without looking very deeply for Mr Hart's motives, we see abundance of reason for his entering into this negotiation, even with reference to his own debt; he might well be anxious to do anything which would give an appearance of a hold upon the Bank of Australia; if it was ever so slight an appearance, it was so much gained. As regarded himself, he had £125,000 in peril: for it is very manifest, that the other names on the bills were of no value: as Peacock, Egan. But it is unnecessary for me to run over *yesterday's muster-roll*, to remind you what a pretty ragged regiment there was to march through Coventry with. It is very easy to say, "they were very good bills, or we should not have discounted them;" but I much suspect that the bills lying in the Banks in February, 1843, had been lying there all through 1842; they might have renewed them because they could not help themselves. And who can doubt that a man of Mr. Hart's sagacity would be anxious, in 1843, when, though Hughes and Hosking's property was valued at half a million, fears were entertained of their suddenly stopping?—who can doubt that he had secretly a distrust of Egan, Peacock, and the rest?—and that he would be glad to avail himself of ever so slight a hold upon the Bank of Australia as a collateral security? His position then was this:—He had £125,000 tremblingly at stake; and if that had been lost from the sudden failure of Hughes and Hosking, and those dependent upon them, not merely to the extent of his direct interest in those parties would Mr. Hart have suffered, but infinitely more by the general panic that must have followed.

If Hughes and Hosking had then suddenly come down with a crash, what must not have been the state of the Bank? What must not have been the state of every Bank in the colony, with all these crushing demands which would then have come upon them? It is very well to show the state of our accounts, and that our deposits and liabilities could not have been paid on the spot, but it would have been equally impossible for the Bank of Australasia to have paid theirs, if all their depositors had wished to withdraw their capital. If the thousand actions which might have been brought had poured in upon them, how could they have paid? No bank, according to my learned friend's showing of the principle on which banks are worked,—no bank could pay if it were called upon to pay all its liabilities at once. But it is because they know that they are not liable to be called upon at once that they go on. Ours was not called upon to pay all at once—it was gradually called upon, and the liabilities were gradually wiped off. Although that might be so ordinarily, what would have been the state of things if Messrs. Hughes and Hosking had been allowed suddenly to stop? They would have brought down all those who were dependent upon them in their face; there would have been no one to fly to—all would have been in the same condition. We have then, without considering the question of security, an abundance of motives for Mr. Hart to enter upon the contract. He looked upon it as likely to ward off the ruin of his Bank; that was the object he had in view. My learned friend talked, actually talked to you, gentlemen, about "the generosity" of the corporation: it was an insult to you—an insult to Mr. Hart; had it been said out of Court you and he would have laughed at it. Generous! What has he to do with generosity? He has no right to be generous—he is put there to look after every farthing, and has no right to let a single farthing go out of the coffers of the Bank, unless he sees a proper prospect of securing a corresponding benefit to the proprietary,—he is bound to do so; but it was no generosity. He saw that if Messrs. Hughes and Hosking went, if all the frame of their customers followed—as they must have followed—that probably no Bank could stand, and his institution must stop payment with the rest. Having this motive, let us see what he did. Instead of himself having to go, as might have been the case, for help to the Commercial Bank, the Union Bank, or the Bank of New South Wales, we went to him, and he then begins to think he ought to turn this to some advantage; and seeing, as he must have seen, that he could not in reality bind the proprietary, that that was beyond the power of the directors, beyond the power given them in the Deed of Settlement, and that £150,000 or more would be lost, and that if he passed that sum through their hands he would gradually get it back by means of his customers, he sets about making the contract which I shall have occasion to call your attention to by-and-by, and unfortunately for us, succeeded in his main object. The directors got the money from him, he putting conditions into the contract that render it null and void, and all depending upon it null and void. But before we dwell upon that, let us come to the next point that my learned friend urges in support of his case, as a matter of equity forsooth! He says that they have hardly got anything paid off on account of Hughes and Hosking, and that one of the objects was, as appeared by the conditions he read to you, to meet Messrs. Hughes and Hosking's liabilities, and as far as the Bank went they had very little benefit, "not a farthing's-worth of benefit" were his words. However, it appears upon the evidence that the position of the bank was this, that it held £125,000, worth of Messrs. Hughes and Hosking's paper, without security, and it appears now that part is paid off, and that they have got security for some of the rest, and from whom?

The Solicitor-General: For a small part.

Mr. Windeyer: Gentlemen, if it had been for only a small part of the rest, can you imagine that they would not have got evidence to that effect from that very ready witness, Mr. Falconer, or Mr. Hart? When our cross-examination showed they had security for a part, my friends did not ask whether it was a small part. Can you doubt that they got security for the main part? I only wish to put it for a part; but from whom does it appear that part of the security had been really derived? The truth was, it came out after a great deal of trouble that it must have been from the Bank of Australia. The security now held by the Bank of Australasia for the paper of which Hughes and Hosking were only endorsers they obtained directly of the parties whom they held immediately liable; but Mr. Hart very properly acknowledges that he knows these parties themselves got the security from Messrs. Hughes and Hosking, and then it appears from part of the evidence given about ten days ago, and which my learned friend appears to have forgotten, that the Bank of Australia had itself furnished the securities to Hughes and Hosking to the amount of about £40,000, out of their property made over to it to secure the advances to the Bank of Australasia.

The Solicitor-General: Where is that stated?

Mr. Windeyer: It is in the evidence; you read it yourself.

The Solicitor-General: I do not know where; you have read it in your brief.

Mr. Justice Dickinson: What is now disputed?

Mr. Windeyer: My learned friend certainly stated this, that we got security from Hughes and Hosking, that we had taken all Hughes and Hosking's property and as security, that we now wished to keep both the property we obtained from them for the money of the Bank of Australasia and the money too. I cannot have fancied that.

The Solicitor-General: I said that.

Mr. Windeyer: If we got all Hughes and Hosking's property as alleged, it is quite clear that if Hughes and Hosking were afterwards able to give any security to the endorsers to enable them to give it to Mr. Hart, it must have come from us, and I understood Mr. Hart to admit his knowledge of that fact. Therefore, Mr. Hart's position at present is this, for his £125,000 of bad paper he got partly paid and partly secured, and it has saved his bank. Now what is our position? It is made a charge against us, "Oh! if any of Hughes and Hosking's liabilities were cleared off, they were liabilities for which the Bank of Australia was liable, but Messrs. Hughes and Hosking did not get the money, therefore this is a kind of breach of contract." Now, gentlemen, there is another bit of evidence which my learned friend has forgotten, for I shall be able to show you as plainly as figures can show, that he is quite mistaken in that matter. I will show it in several ways. First, we did not want it ourselves—our own deposits and liabilities amounted to £113,000. It appears—

The Solicitor-General: I must object to my learned friend referring to the facts stated in the report as proved in evidence.

Mr. Windeyer: My learned friend having made that objection, I will at once admit that you are not obliged to believe the reports he has read, but my learned friend having put them in for his own purposes, he must allow me to take them all as before you, and if he wanted to make out that any matter stated in them is false, he ought to have proved it to be so. He cannot pick out one sentence and say, "Hear what is said here," and object to another part of the same paper. I quite admit that you may disbelieve this if you please, but if my learned friend wants you to disbelieve any part, he is bound to prove that it is false. However, I hardly think you doubt the truth of the matters before you.

Mr. Justice Dickinson: What is the document?

Mr. Windeyer: It is called "Statement No. 1," by which it is shown that our liabilities and deposits, independently of Hughes and Hosking's were £113,000; I grant that we had not £5000 in coin to meet them, but we were not likely to be called upon for them; and it is shown by the last report that my friend put in, that we have now notes out to the amount of £823, deposits £1000, and open accounts £2000, so that our liabilities on account of notes and deposits may be said to have been gradually wiped off. Now the question is, how have we done this? It appears by Mr. Hart's statement, that it was expected we should realise, in the course of three or six months, about £70,000 from our own assets, and that about £70,000 would come from Hughes and Hosking's assets. It also appears that we had in our hands assets to the amount of £300,000 and upwards, in bills payable, and obtained of the Union Bank, £60,000, by re-discounting a portion of these assets. It is not difficult to suppose that we re-discounted another part of the same assets at other banks; but that is not necessary, in order to make out to you that we had sufficient funds of our own coming in to pay off the £113,000 of liabilities, on notes and deposits outstanding in February, 1843. I show that there did actually come into our hands, £130,000, which will easily account for the disappearance of our own proper liabilities—we paid them. The next question is, what have we done with the £150,000 which my learned friends have traced into our hands from the Bank of Australasia? My learned friend does not attempt to say, that the directors have put it into their pockets; neither they nor Mr. Mackenzie are charged with being so bad as that would make them out to be. Then we have got to find out what has been done with it. The first piece of evidence we have on the matter, but which did not go far enough, because my learned friened stopped it, was given by Mr. Walker, who said, it appeared from the books, that we had paid upwards of £150,000 on Messrs. Hughes and Hosking's account. It was upwards of that sum, but it is not necessary to state the precise amount.

The Solicitor-General: I do not admit that.

Mr. Windeyer: It is matter of evidence that Mr. Walker, as trustee of Hughes and Hosking's estate, admitted the receipt from the Bank of Australia of £150,000 and upwards, but my learned friend stopped there.

The Solicitor-General: My learned friend is quite mistaken.

Mr. Justice Dickinson: I have here a notice, "as one of the trustees, I admit, that Messrs. Hughes and Hosking were indebted to the Bank of Australia £150,000."

Mr. Windeyer: "And upwards." That is all I want from Mr. Walker's evidence, but that did not show when it was, and it was left open to my learned friend to say, that as it appeared the cashier of the Bank, Mr. Mackenzie, had entered into liabilities on account of the Bank for Messrs. Hughes and Hosking, before this loan was negotiated: it might have been before that circumstance. But we have a piece of evidence put in by my learned friend for what it is worth,—you may disbelieve it if you like,—which I think puts the matter beyond a doubt. Mr. Hart stated, you will recollect,—whether by mistake or not is not material, though I think it must be a mistake in making the sum so large,—that Hughes and Hosking, and John Terry Hughes, had an overdrawn account in our bank to the amount of £60,000 when the loan was negotiated. That was in February. Now it appears by the second page of the report of the 7th of September, 1843, laid before the proprietors, and put in by my learned friend, after we had undertaken to do what we say we did do, that the overdrawn account of Hughes and Hosking and of J. T. Hughes was, together, £181,859; so that if you deduct from it—as you must if Mr. Hart's statement be correct—the £60,000 drawn in February, it will still leave the sum of £121,859, which must have been added to the overdrawn account. In other words, we must have paid this sum to Hughes and Hosking between February and the date of this report, in September. This is so plain that it cannot be disputed. But there is another entry in the next report of the 22nd of January, 1844, which shows plainly that that overdrawn account did not include the whole liabilities of Hughes and Hosking to us, because it is directly stated that the whole of the accounts upon which we claim are—

Hughes and Hosking,...	£155,225
J. T. Hughes.....	61,656
Making.....	£216,881

No doubt the difference between the two sums is made up in other matters not included in the overdrawn account of September. Therefore, joining Mr. Hart's evidence with the other facts, namely, the fact that we had means of our own to pay our notes and deposits, the fact that they were paid, and the fact that the overdrawn account of Hughes and Hosking increased from January to September, from £60,000, the sum stated by Mr. Hart, to the £181,859, stated in the September report, it is clearly shown that we must have paid at the least, £121,000.

The results I have arrived at from an examination of the mountain of figures which my learned friend piled up before you are so plain that a child could not mistake them, and if everything were to depend upon that you would have to decide in our favour. But what my learned friend told you in his opening address was quite true, that supposing upon a dissection of the accounts it was found that the money had not been applied to the purposes of the bank, but to pay the debts of Hughes and Hosking, it would signify nothing—it is so in point of truth: it is utterly immaterial what became of the money, it is utterly immaterial whether the directors put it in their pockets or paid their own debts with it, or whether the proprietors had it, or whether Messrs. Hughes and Hosking had it. My learned friend appears to have thought there would be a dissection of the figures, and that I should make out a disposal of the money for Hughes and Hosking; but supposing I had disappointed him in his expectations, and had not succeeded, I should then have fallen back upon the matter of law, for your verdict will have to be returned quite irrespective of whether the Bank of Australia has performed its contract or not—our defence rests upon the fact that the contract is null and void, and that no after act could patch it up if it was invalid at the time it was made. I will only observe with reference to the performance of the contract, that we were not bound to pay off the sum all at once, that it was not expected from us. It appears, however, that it was paid between February and September; but whether it was paid then or between February and May, will not signify. His Honor will tell you that the validity or invalidity of a contract does not depend upon whether it is performed or not, and I have only troubled you at this length in order to show you that my learned friend is quite mistaken in his positions, both of law and fact, and also to relieve your minds of any doubt as to whether we are in the inequitable position in which my learned friend seeks to put us, by saying that we wish to keep both money and security. I have shown you that we have not kept the money, and with regard to the security, I will say a word by-and-by, when you will

see that my learned friend is mistaken upon that head as well as upon the other.

I am sorry, gentlemen, to have troubled you so long as I have, upon what I am obliged to acknowledge is only the fringe of the case. We are in truth only now coming to the case itself. But when my friends have been during so many days filling up immaterial matters, you will excuse me, if, fearing they may have made an impression upon your mind, I thus endeavour to sweep them away. It is obvious from the length of time that has been occupied in this trial, that there must be some impression made on your minds by my learned friends. For the dunning of one thing into a man's head for seven, eight, or nine days running, even though at the first he thought nothing of it, would at length produce some impression; and we know that the imagination may be so worked upon by the continued contemplation of one subject, that a man may at length be brought to believe that which he at first thought was false. There is that in the constitution of the mind which my learned friend would have the advantage of, if I did not in this way endeavour, however feebly, to counteract the effect which he has tried to produce during the last six or seven days. The circumstance of the speech and evidence being printed day after day, must also have had its effect. Fielding has observed with reference to the benefit of having two counsel to address the Court, that although the second counsel always repeats what had been said by his leader, the mere repetition makes an impression upon the Judges. And if this is the effect produced upon men trained to habits of investigation, who may be supposed to see in the first instance the true bearings of an argument, how much more strongly will it apply to those who are unaccustomed to such matters. Fielding was an excellent judge of, and had an extensive knowledge of, human nature, and there can be no doubt of the truth of the principle, that by frequent repetition, the most absurd story will gain credence; my learned friend has given his version of the story for the last six or seven days, and you have had it served up a second time at the breakfast table.

I would now, gentlemen, draw your attention to the actual position which the case must take for your decision. Having shown you that it is quite immaterial, whether my learned friend's "broad facts" are, as he has stated them, or not, and which you will see, from the authorities I shall quote by-and-by; I will tell you the only fact upon which I rely—the only one out of the mass of evidence you have heard, I wish you to find; because, if you find that fact, all the consequences that I wish for, up to a verdict for the defendant, must follow: That one fact, or rather the one proposition, is this—that the Bank of Australia was a joint stock company, managed by a chairman and board of directors, under a deed of settlement, and that it was known so to be by the plaintiff. Now, if all the branches of that proposition are proved, the defendant, I shall show you, must have a verdict quite irrespective of all the matters I have been discussing hitherto; and it will be plainly manifest that that proposition being established, all the others will follow as a matter of course. It is the clue which, being taken hold of, will help you to unravel the immense and entangled mass of facts around you. The evidence on this subject seems pretty clear. Mr. Falconer admitted all I desired, almost in a lump. Indeed, I asked him the question point blank; he did not answer it quite point blank, for he never did any question; still it came pretty near the mark. The answer he gave was, that they asked for the deed of settlement before the loan was contracted; they asked for and got it when the loan was agreed upon. He also admitted, upon being further questioned, that he knew before that this was a joint-stock company, managed by a chairman and board of directors. Besides, there are other facts in the case, which ought to have made them ask for the deed, and which are sufficient to bind them by its contents, even though they were not aware of its existence: for it appears upon the face of the bill itself, that it is signed by procuration; which means, that the person signing it was signing it under some authority; and they seeing that were bound, as you will see by-and-by, to ask for the authority. However, that is so plain that, coupled with what Mr. Falconer stated, I conclude that you will find it is the fact, that the Bank of Australia was a joint-stock company, managed by a chairman and a board of directors, under a deed of settlement, and was so known to be by the plaintiff. The consequences of that being the state of facts—of their knowing it to be the state of facts—are that they are bound by everything in that deed. It conveys to them the knowledge that the Bank of Australia is a joint-stock company—that its business is conducted on behalf of the proprietary at large, the parties at present sued, through their agents,—that that agency is constituted in a particular manner, and that the agents have particular powers: therefore they are mixed up with all this, and the consequences that are deducible from that will appear from the deed itself. Previous, however, to putting the deed before you, it will be necessary to show you, and I will do so as shortly as I can, in what the great importance consits of the plaintiff knowing that this was a joint-stock company, managed by a chairman and directors, under a deed. All the cases which my learned friend will have to rely upon, should he go before the Court hereafter, are cases where partners in ordinary partnerships have sought to bind their copartners. Now this is a case of a joint-stock company, and you will see, when you come to consider, why partners in ordinary partnerships can bind their copartners, and are not able to do so in joint-stock companies. In ordinary partnerships the parties meet together on terms of mutual confidence—they rely on each others integrity—they know each other, and are convinced that neither will pledge the partnership name except properly,—that they will not engage in hazardous concerns with which the partnership should have nothing to do. That being the principle on which they have come together, the law follows it up by saying, that the partners having met together in this way, each partner is the agent of all the others, and has power to bind all the others. Therefore if one partner chooses to give, for any purpose connected with their traffic, a bill of exchange or promissory note, the firm would be bound by that, although the rest of the firm disapproved of the transaction. Nay, more, if all the rest of the firm beforehand disapproved of the particular transaction; yet, if the party with whom the one partner dealt did not know of that, he would not be bound to enquire whether the authority of the particular partner was limited, because the law says, that one partner shall within the scope of their business be the agent af all the rest. A partner has authority given him, by implication of law, as the agent of the others, to bind the others. But it would be impossible for partnerships to exist at all, if the power thus given over the property of all were not limited, and it is limited by law to the transactions that properly belong to the business of the firm. For instance, in a partnership of linendrapers, the partners can bind one another in matters connected with the usual course of their business, and belonging to their business; but one partner, although he could buy soft-goods, could not buy sheep, cattle, or stations, and give a bill in the firm's name for them. If he did the other partners might turn round and, as my learned friend says, "repudiate" the contract. That is, they would deny that they made the contract—they would say, the matter is none of ours, it is out of the ordinary course of our business; and although you, the seller, would not have been bound to enquire as to the authority of our partner in matters connected with our business, and in the usual course of business, you are bound to enquire as to his authority, if you choose to deal with him in a matter out of the ordinary course of our business." And not only is the authority of a partner limited to the ordinary business of the firm, but it is limited as regards its extent, by the extent of the business. Suppose for instance that two persons agreed to be partners in a chandler's shop, it would not authorise one partner to buy a ship or an immense cargo of goods; because it was never implied, the law could never have intended that one partner in a chandler's shop should bind the other in anything beyond the scope of that business. Take another instance, it is not uncommon up the country for a settler to set up an old servant as a butcher; there may be an understanding between them that the servant shall have a share of the profits - that in law may amount to a partnership, and the law, however much to the surprise of the gentleman settler, would bind him by the contracts made by his butcher partner, in the ordinary course of their business; if he bought a sheep or two, or a bullock or two, and gave a bill for them, or went on credit, the person who sold the sheep or cattle would be able to come upon the partner; but if the butcher partner took upon himself to go to Mr. Lawson or any other large stockholder, and buy a cattle station with the cattle and sheep upon it, although it might appear to have some connexion with the business, yet being in substance beyond it, the settler might say "it is true, I gave my partner authority to buy two or three sheep, and a head or two of cattle, but I gave him no authority to purchase two or three thousand head of Mr. Lawson," and if Mr. Lawson sued him for the amount he would fail. It would behove Mr. Lawson to ask the person who was thus going out of the ordinary course of his business for his authority to bind the partner in this matter. Well, gentlemen, if the law places that limitation, as I shall show it does—I shall prove it beyond a doubt—upon the authority of a partner in an ordinary partnership, cannot you see abundant reasons why the limitations should be stricter in the case of a joint-stock company? In this case there are about two hundred people who have met together for the purpose of carrying on business, but there might be a thousand. It is quite clear there is none of that mutual confidence, none of that reliance on each others integrity, none of that implied agency which exists in the case of a common partnership. In a common partnership the members have an equal voice, equal control in the management of the common concern, and the law holding that all have consented, it follows that all are bound by, and can all be sued for, the act of one partner. But the law cannot imply such an authority in the case of joint-stock companies: it would be an absurdity. The reason of the rule of law in the case of common partnerships there fails, and the law will not blindly follow a rule which leads to absurdity—the reason of the rule ceasing: the rule ceases, and another springs up in its place. It would be absurd that any one of the partners—that an alien, a minor, a madman who might become a proprietor, should by any act of his involve all the others in ruin. My learned friend has truly stated that the practice with respect to joint-stock companies is that the great body is governed by a part of the proprietors only, who are chosen, and whose duties take the form of an agency to act for the others. But the instrument that creates that agency is the deed of settlement; that deed is the power of attorney by which they act, and having notice of that power of attorney, any person dealing with them must cast aside all implication of authority, and look to that. There is no doubt that in a great multitude of instances, the small and ordinary acts of a joint-stock company may be assumed by those dealing with them; and the power exists, for instance, where a clerk at the counter has power to pay a check, and does pay it without any mention being made of such power in the deed. For all the ordinary purposes of business this may be sufficient; but you will see by-and-by the distinction that is drawn between all ordinary acts which must be performed, if the partnership is to be carried on at all, and those which are not necessary to the existence of the partnership. That, gentlemen, is the rule with regard to joint-stock companies, and you will see that that rule lets in the principle governing ordinary partnerships, viz., that all are bound, because all have consented to be bound. So, in joint-stock companies, every person is bound by that which he consents to be bound by. Now here, the whole body of joint-stock proprietors is sued, and it is therefore for my learned friend to make out that all have consented to be bound in the manner it is pretended they are bound; because, if there is only one person who has not consented—if, supposing the company to consist of 100 persons, the plaintiffs can show, *seriatim*, the consent by 99 out the 100, and fail to show the assent of the hundredth to that contract, they must fail. Whatever remedies they may have against the 99, they can only sue the 100 collectively, by showing, that all have entered into the contract by which all are to be bound. Here it is pretended that the chairman or directors, or the two together, have entered into a contract, by which they bind all the proprietors, and that at a meeting of proprietors the contract is ratified. I shall come to the latter point by and by, but I will now state what it is that makes me feel so strongly positive in the position I have assumed; I do not ask you to take the law from me; His Honor will tell you whether I have cited it correctly or not. It appears to me that the Jury will be at liberty to interpret mercantile phrases. Of them you may judge as mercantile men, conversant with business, or, what is almost the same proposition, evidence might be given as to the mercantile phrases and mercantile usage used or referred to in the deed of settlement. On this point I will simply cite "Story's Commentaries on the Law of Agency:" in page 61, he observes: "And what is the true interpretation of mercantile phrases in such instructions or orders is not always a question of law, but may, in many cases, be properly left to a jury to decide, where the phrases admit of different meanings. Thus, for example, it has been left to the jury to say whether the words in a letter, referring to a bill of exchange enclosed, '*when duly honourred*' meant in the connexion duly accepted or duly paid." The words "when duly honoured" are equivocal; they might mean either the one or the other. There is no doubt, however, that upon the vast bulk of the matters of law, and the interpretation of this instrument, you will have to take directions from His Honor, not, of course, resigning your independence upon the points that properly belong to you. Indeed it is always a safe course for juries in matters of law to take the directions of the Judge; and if he tells you that the law of the advocate is bad, you are bound to conclude that the advocate is wrong, and the Judge right. I trust I shall put the law in such a way to you that I shall avoid affording any ground of correction by His Honor. I shall do so the more carefully in this particular case, on account of the circumstances to which my learned friend referred in his opening address, and which I have touched upon myself, namely, the difficulty there is in a limited community like this of finding persons who are not more or less interested on one side or the other. That applies to every individual in this community with the exception, perhaps, of His Honor upon the Bench, who, from the fortunate circumstance of his very recent arrival in the colony, could not possibly be supposed to be influenced either way. In His Honor's case, therefore, it will be impossible for even the most corrupt minds—and corrupt minds will impute interested motives wherever it is possible to do so—to cast any imputation whatever. But to you, gentlemen, the advantage of citing the authorities which I purpose to bring before you is this, that in these cases there can have been no preparation to affect the minds of the Jury. These cases were decided in a country far away from us, where there are not the objections to jurors, on the ground of the smallness of the community, that apply here. Why, in the city of London, the difficulty would be, not to pick out the names of jurors who were not acquainted with the parties interested in the cases, but to pick out those who had even ever heard of the parties; for with the exception of cases in which such prominent bodies as banks are concerned, all the cases are to the jurors as John Thomas against John Smith. They are decided upon the pure abstract principles of truth and justice, without reference to one party or the other; and that is the reason why the Judges do abide by precedents. It is not that they are incapable or unwilling, when required in a proper cause, to resort to principle and expound the law themselves, but it prevents all cavil, all confusion, all shadow of suspicion, if they they take the law as declared in previous judgments. So that it may be a great comfort to you, gentlemen, if you are acquainted or connected with parties involved in this trial, to find that you are able to return a verdict in accordance with cases that have been already decided. And if, in after life, any one should refer you to your verdict, and charge you with having been biassed one way or other, either against the plaintiff or defendant, you may then point to the law as it was laid before you, and feel satisfied in your consciences that it was given in conformity with approved precedents. I will now, gentlemen, bring under your notice a number of cases from the law authorities, without much comment upon them as I proceed, trusting to your discernment to apply the cases to the principles I have laid down, and the actual state of things. I shall by-and-by refer more particularly to the actual state of things and to the deed of settlement; but I am now referring you to the key by which you may unlock them; to the rules by which, under his Honor's direction, you will be bound in considering them. These cases, although most of them may be new to you, are familiar to his Honor and most lawyers; and I may further, by way of apology, beg to remind you, that although the principles for which I contend are very plain—so plain that in small cases they would never be contested—they are now to be contested solely on account of the magnitude of the sum contended for. The stake that Mr. Hart is now playing for is so great that it is worth his while to take the remotest chance of upsetting the whole decisions, and of establishing now constructions that may be favourable to him. But you will see what really is the law, and if he can succeed for his particular purpose in upsetting all that has been previously understood as the law, it will be a great misfortune, for no man can then know in what he is to trust. The first case is reported in 3rd Bingham's New Cases, p. 991, but better reported by Scott; and, as I read it, and the others that are to follow, you will observe that every single sentence I have uttered to you containing a principle will be borne out by the authority of the Judges. I trust I shall carry you along with me, and shall not have to go over the same ground again and again in nursery fashion:

This is the maiden all forlorn,
That milked the cow with the crumpled horn.

And then again:

This is the man, all tattered and torn,
That kissed the maiden all forlorn,
That milked the cow with the crumpled horn.

But that you will observe for yourselves that one position is established before I go to another. In Bramah *v.* Roberts, 5 Scott, 185, it is said by the Court:

The bill did not appear to be a bill of exchange accepted by one of the partners of an ordinary firm trading in partnership together, but a bill drawn upon the Directors of a Joint-Stock Company, and accepted by the Chairman for himself and the other Directors: for the address of a bill to the directors of a Metropolitan Company, and the form of acceptance by a chairman of such directors for himself and the other directors, can only be referable, unless some explanation is given, to a company of the description well known in all the Courts of Law and Equity in Westminster Hall as Joint-Stock Companies, and not to ordinary partnership in trade. The right of one director to draw a bill upon the rest, and still further, the power of one director to accept a bill for himself and the others, so as to make those others liable, according to the case of Dickinson *v.* Valpy, 10 B. and C, 128, in the authority of which case we concur, is not a right or power implied by law like that which belongs to one member of an ordinary partnership in trade with respect to bills drawn and accepted for the purposes of the trade; it must depend upon the powers given by the charter, or deed, or agreement, under which the Company is established and constituted, or some other agreement between the parties, whether a bill so drawn and accepted shall or shall not have that legal effect.

I will now call your attention to the case on the decision of which the Chief Justice, on behalf of all the Judges, says he concurs. Dickinson *v.* Valpy, 10 Barne and Cress. p. 136, Lord Tenterden, C.J., says: "Assuming that the defendant was proved to be a partner, and not merely to have done certain acts in contemplation of becoming a partner, it was not shown that he or the other members of that company had given any authority to a certain part of the company to bind the rest by drawing or accepting bills of exchange. In order to show that, the plaintiffs should have gone further and proved some express authority for that purpose, or facts from which the law would imply such authority. The deed executed by the defendants and the other partners, may perhaps have contained a clause empowering the directors to draw and accept bills, but that was not produced. In the absence of such proof, I am not of opinion that the mere circumstance of the defendant's having become a shareholder in a mining company does not in point of law make him answerable for bills drawn or accepted by those who took upon themselves to manage the concern." Bayley, Justice, says, "I am not prepared to say that there was sufficient evidence to charge the defendant either as an actual partner or as a person who held himself out to the world as a partner. A doubt upon that point, however, would only entitle the defendant to a new trial. But in order to establish his liability, it ought to have been made out affirmatively on the part of the plaintiff that this was a company in which the directors were authorised to bind the other members by drawing and accepting bills. Now upon that point, the only question which could be submitted to the Jury was, whether companies instituted for similar purposes, had constantly been in the habit of drawing and accepting bills."—I pray you note the words, gentlemen, I shall not read you the whole report, but every word here is significant, and tells upon the present case—"*Companies instituted for similar purposes had constantly been in the habit of drawing and accepting bills;* or whether it was absolutely necessary for the purpose of carrying on the concern, that there should have been such a power? There was no evidence to warrant the Judge in leaving those questions to a Jury: First, there was no evidence for them that such a power was usually vested in the directors of other companies, or that it was necessary for the purpose of carrying on such a concern. I think that such a power is not necessary for that purpose. The directors of such a company ought to take care to have ready money to answer all demands upon them. If they have not I cannot suppose that *every person who becomes a shareholder in such a company understands that he is to be personally liable upon a bill of exchange, drawn or accepted by a director,—for the effect of that would be to authorise the directors to pledge the credit and responsibility of the individual shareholders to any extent;* and if that was not the understanding of the shareholders, the directors could not have any implied authority to pledge the credit of the other members by drawing or accepting bills. The directors may bind themselves personally, and pledge their own responsibility, but not that of the other members. I am therefore of opinion that there was in this case no evidence of any authority conferred upon the directors by the defendant, or any other members of the company, to charge them individually by drawing or accepting bills of exchange." Again, at page 143, hear Judge Bayley—"The effect of saying that one member of a company like this can draw such bills or promissory notes, would be that each of the partners in the concern would have the power of pledging the others not only to the extent of the goods the company might sell in the course of their ordinary dealings, but without any limit at all, inasmuch *as one partner might raise money to any amount by drawing bills of exchange, and if they were passed into the hands of innocent endorsers, the partners would be liable to the full extent of their fortunes.*" The authority must be given in express terms, for the law would not infer anything so monstrous as that any one member of a company, out of any two hundred, should be able to pledge its credit to the extent of the fortunes of every individual proprietor; and if this suit should succeed, every individual proprietor would be liable by writ of *scire facias*, not for a rateable proportion, but for the whole sum of £180,000 which is sought to be recovered. I see that I have not arranged the cases in the order of the propositions which I have put before you—I ought to have cited the case I am now about to cite before, but it applies to what I have said. The marginal note of Withington *v.* Herring and others, 5th Bingham, page 442, is—'Defendants entered into an agreements with C. to carry on for them certain mining speculations in America, furnished him with instructions—a letter authorising him to draw on them for £10,000, and a power of attorney of the most extensive description 'to take and work mines, to purchase tools and materials, and erect the necessary buildings, and to execute any deeds or instruments he might think necessary for the purpose.' C., after he had raised £10,000 under the letter of authority, obtained of plaintiff in America £1500, which he applied to the defendants' use, and for the amount drew bills on defendants which he endorsed to plaintiff. He did not show the letter of authority to the plaintiff; there were no endorsements on it of sums previously raised, and it did not appear that the plaintiff knew that any money had been raised before by C.; the defendants refused to accept the bills.'" The jury gave a verdict for the plaintiff, and found specially, "1. That it was the duty of the plaintiff to call for the power of attorney and letter of credit. 2. That there was no evidence whether he had done so or not. 3. That there was no evidence of his having been informed that money had been advanced by others under the letter of credit." A rule *nisi* was obtained to set aside the verdict, and Best, C.J., says, "The jury have found that it is the duty of a party advancing money to an agent to look at his power of attorney and letter of credit, negativing thereby the necessity of calling for his letter of instuctions, and properly too, because the agent's letter of instructions may contain communications which it may be neither safe nor convenient to divulge. If therefore the power of attorney and letter of credit did not constitute a sufficient authority for what Crabtree has done, the plaintiff is not entitled to recover." Attwood *v.* Timmings, 7 Barne. and Cress., p. 283, Bayley, J., says: "This was an action upon an acceptance importing to be by procuration, and therefore any person taking the bill would know that he had not the security of the acceptor's signature, but of the party professing to act in pursuance of an authority from him. A person taking such a bill ought to exercise due caution. for he must take it upon the credit of the party who assumes the authority to accept; and it would be only reasonable prudence to require the production of that authority. The plaintiff in this case relies on the authority given by two powers of attorney, which are instruments to be construed strictly." We shall gradually, as we get on with the authorities, as children say in one of their games, begin to "burn;" we shall get closer and closer, till we find out what we want. In fact, searching for cases in point is very like a game the nature of which I have forgotten—it is so long since I played at it—where the parties in search of that which is hidden are told, as they approach it, that they get "warm and warmer," till at last they "burn." So we, after gradually getting closer and closer to our object, at last lay hold of the case, which says "burn." I have now cited cases decided by the Judges; but in order that you may not suspect that I have picked out a few special cases, I will bring under your and His Honor's attention, the authority of text writers who have collected the law and put it down as gathered from all the cases. These books are of no authority except so far as they concisely state what is put down in the other books; you will see that they do state the law as I have pointed it out to you, and they will be valuable witnesses of my good faith to you. It would not be necessary that I should cite these text books, were there not some who think there are authorities to be found on both sides of all questions; this is not the fact; there are, no doubt, nice points on which authorities may be cited on both sides My learned friend will say that this is such a case, and will endeavour to find out some authorities on his side. Well then, I give him the benefit of this book, which points out the authorities on both sides. Story on Agency, page 58: "Where an authority purports to be derived from a written instrument, or the agent expressly signs the contract or other paper, introduced with the words 'by procuration,' (as if he signs 'by procuration' of A. B., his principal), C. D., (the agent.)" In such a case the other party is bound to take notice that there is a written instrument of procuration, and he ought to call for and examine the instrument itself, to see whether it justifies the act of the agent. For under such circumstances it is but a reasonable precaution and exercise of prudence, and he is put upon inquiry. And if from his omission to examine he should encounter a loss from the defective authority of the agent, it is properly attributable to his own fault, since he must know that he has no other security than his reliance upon the credit of his agent. It has been said by a learned Judge that the same principle prevails in the civil law, for if a person is acting *ex mandato*, those dealing with him must look to his mandate." So in page 65, of the same book: "In the next place it may be laid down as a general rule, that where an express authority is conferred by informal instruments, such as letters of advice, or instructions, or loosely drawn orders, especially where they are general in their terms, or confer a general authority, they are construed with more liberality than more formal and deliberate instruments. This rule is adopted for the convenience of merchants, and indeed seems indispensible to general confidence and security in the ordinary operations of commerce, and navigation, and trade." That is all that can be cited to the Court upon the general proposition I have put to you, and I submit that it does not affect it at all. As to the question of ratification, I shall come to that by and by. I contend, that the deed of settlement is not an informal istrument, that it is a formal instrument given under seal, and is therefore to be strictly construed. By and by, I shall show that even if it is construed ever so loosely, ever so liberally, in any view of it my learned friends will not be able to pick out anything that will help them. The same doctrine as that to which I have referred is laid down in Storey on Partnership, pp. 193, 195: "In the next place every contract in the name of the firm, in order to bind the partnership, must not only be within the scope of the business of the partnership, but it must be made with a party who has no knowledge or notice that the partner is acting in violation of his obligations and duties to the firm, or for purposes disapproved of by the firm, or in fraud of the firm—for every such contract made with such knowledge or notice, will be void as to the firm, however binding it may be upon the individual partner making it. This is a natural result of the principles of justice and equity applied to every other contract as well as to that of partnership contract. It also follows from the known limitations of the law of agency—for no agent can bind his principal in any transaction in which he knowingly exceeds his authority, or knowingly colludes with another person having notice in any violation of the rights of his principal."—"This doctrine may be illustrated in various ways, but the same principle pervades the whole of the cases—thus, if a person should trust a firm with a full knowledge that one partner had withdrawn from it, or that the firm was dissolved, or that the other parties disavowed or repudiated any such transaction, in each of these cases he would have no remedy against any of the partners, except the one with whom he had entered into the contract; so, also, if the creditor should have notice of any private arrangement between the partners, by which the power of one partner to bind the firm, or his liability on the partnership contracts, is qualified, restricted, or defeated; the creditor would be bound by such arrangement, and could not enforce any right in contravention thereof." Mr. Story, who wrote this, is an American Judge, and an excellent lawyer; but, as in desperate cases like this, any appearance even of an objection will be laid hold of, I may state that this is a work of great authority; is in fact, in many respects preferable to our own text books. But to prevent all dispute, I will now cite the law as it is given by an English testator, Gow on Partnership, 3rd edition, p. 49—"On the subject of negotiable instruments it remains to be observed that even in transactions in which all the partners are interested, the authority of one partner to make, draw, accept, or endorse promissory notes or bills of exchange in the joint name is only implied, and may therefore be rebutted by express previous notice to the party taking a joint security from one partner, of his want of authority, or that the others will not be liable upon it, such a power is not indispensably essential to the existence of the partnership." I am willing to admit at once that anything indispensably necessary to the existence of a partnership may be implied. For instance, it is necessary for the existence of a joint-stock bank that a clerk shall be able to pay money across the counter, therefore that may be implied. But what I shall contend, to go a little further in advance of the argument, is, that whatever was done was not essential to the existence of the Bank—it was not necessary, for the Bank had existed for years without such a power being exercised, or attempted to be exercised. There was a great number of authorities cited by Gow, as your Honor will find, and there is one of them which I shall have occasion to produce in another part of the case, Kilgour *v.* Finlayson, in 1st H. Blackstone. Finally, several of these authorities were cited, and the principles for which I contend were recognised in a case which came before this Court some years ago; that was a contested case, although it was not one involving so much, and seven days were not consumed in piling up evidence in which the Jury were to lose themselves. It was the case of a Mr. Kentish, who got up a joint-stock newspaper, and bought a quantity of paper for printing. It was wanted for the concern, no doubt, the *Sydney Times*, or whatever it was, could not be printed without; Kentish got credit for the paper, and gave his note, signed "Kentish and Co." The creditor thought this was to bind Kentish and Co., and he had all the joint-stock company brought into Court; but the Court decided, that although the paper might be wanted, the proprietors had not authorised him to give their bill for it; and the languarge of Dickenson *v.* Valpy was cited, that unless the company could not go on without it, they would not imply any power that was not absolutely essential to the existence of the company; and though paper was essentially necessary, it was not implied that Kentish should go into debt for it, but that he should have got it before hand; and if he had not the means of going into the market to purchase the paper, he should not give a bill without the consent of the other proprietors. And so in every other case, all powers must be given in very express terms, and all deeds giving such powers are to be construed strictly. However desirable joint stock companies may be, they could not exist if the Court sanctioned the course contended for on the other side.

I trust that I have so far supported the propositions that I have put forward, and have shown the absolute necessity there was for these parties looking to the deed, that they were bound by it—how it is to be construed—and the difference between the construction to be put upon the power of partners in ordinary partnerships, and the power of partners as agents in joint stock companies. The next proposition is one that will occupy some time, and as it is rather late, I will now beg His Honor's permission to adjourn; but in order that you may not think I design to shirk any part of the case, I will tell you what I shall attempt to show to-morrow,—that the deed of settlement gives no power to the directors to borrow money—what power it does give—the authority in support of that construction; and then, to shake my learned friend's forlorn hope—his ratification by the proprietors—to show that there was no power of ratification, and that supposing they had that power, it had never been followed up, and, therefore, that in any view of the case, they will not succeed; and then, finally, I will show how they may get their money, or what they are entitled to—how they may get justice; and clearly show that we have not, either in point of law or equity, exposed ourselves to the imputation of "repudiation" which is cast upon us. I think I shall be able to establish the facts upon which I rely, from the evidence which has already been put in; but should my learned friends, whose powerful assistance has enabled me to grapple with this mountain of matter, think otherwise, we may add to the evidence. At present, however, it appears to me, that you have devoted so much attention to the case, that we may probably be able to-morrow, to bring it to a close, without risk to the defendant.

The Court then adjourned till Saturday.

SATURDAY.—TENTH DAY.

Mr. WINDEYER: May it please your Honor, Gentlemen of the Jury, I fear I somewhat wearied you yesterday by the great length at which I insisted upon the importance of looking to the deed, and the deed only, for a definition of the authority vested in the directors; but that is, in point of fact, the key, speaking in military terms in these fighting times, to our position, and I am obliged to show you the importance of it. We have seen that we must not only confine ourselves to the deed, unless it can be shown that there was some subsequent authority enlarging it or giving additional powers, but that we must construe it strictly. We have now got to the deed, and have found the key by which it is to be opened. Before opening it, I will just call your attention to what we have to search for when we have opened it; what we have to search for is the power on the part of the directors to borrow money. That is what we are to find in the deed, because, if we cannot find the power to borrow money given to the directors by the deed, this action must fall to the ground. The importance of that matter of borrowing money I need only impress upon you for one moment: for if the present proceeding can be justified, if the directors had power to borrow at all, why should that power be confined to the borrowing of £150,000; they might just as well borrow £500,000 or a million, as £150,000. If to take up the affairs of Hughes and Hosking they could borrow £150,000, it is difficult to see why they should not borrow £1,000,000, which I suppose would be about the amount required, and extend their charitable assistance to all the other distressed persons in the community. If they had the power to borrow this £150,000, there is nothing to limit it to that, and it must be extended to the power of borrowing indefinitely any sum whatever; or in other words, they must have a power (as was said by Mr. Justice Bayley, in the case of Dickenson *v.* Valpy, quoted yesterday), which might involve the loss of the whole fortunes of every individual proprietor in this joint stock company, a power which no single man, much less a body of men, would place in the hands of any agent whatever. Supposing the bare possibility of the existence of such a power, you will require that it should be expressed, and the law requires that it shall be given in express terms. What we insist upon is, that no such power has been given. My learned friend says, that such power has been given expressly. That we deny, and as you are now able to read this deed somewhat with the eyes of lawyers, we will go through it, and see what the power given is. I am quite willing to grant to my learned friend that you may look to the preamble or recital in the deed, for the purpose of ascertaining its objects; but the recital of a deed cannot control the operative parts of it, although if the operative parts be doubtful, you may look to the recital as a kind of clue to the meaning. I apprehend, however, that you will have no difficulty in discovering the meaning, and that it is not confined to the matters referred to by my learned friend.

This is the preamble:—

To all whom these presents shall come, the several persons whose names and seals are hereunto respectively subscribed and set, send greeting:—Whereas, by a certain deed of settlement or instrument, in writing, bearing date the 22nd day of May, 1826, under the hands and seals of the several persons, parties hereto, after reciting (amongst other things) that it had been deemed expedient for promoting the agriculture, trade, and commerce of the colony of New South Wales, that a Bank should be founded and established in Sydney, as well for the purpose of discount and issuing of notes and bills, and lending moneys on securities and cash accounts, for the receiving moneys on deposit accounts, for the safe custody of moneys and securities for moneys, for the general public accommodation and benefit; as also for transacting and negotiating all such other matters and things as are usually done and performed, relating to, or connected with, the ordinary business of banking; and that the several persons, parties thereto, had undertaken, consented, and agreed, to establish such Bank, and to raise a joint stock or capital to carry on the same in co-partnership together, under the name and designation of "the Bank of Australia;" and that the joint stock or capital of the said Bank should consist of the sum of £120,000, to be had in shares of £100 each; and that the said shares should be transferable in the manner therein mentioned. It is by the now reciting deed witnessed, and the said several persons, parties thereto, did each of them, for himself, herself, and themselves respectively, his, her, and their respective heirs, executors, administrators, and assigns covenant, promise, and agree to and with the others, and other of them severally, their, his, and her respective heirs, executors, administrators, and assigns (amongst other things), that they, the said parties, should and would become co-partners and joint-stock proprietors of and in the said capital sum of £120,000, or so much thereof as should from time to time be paid in, and actually form the capital of the said Bank, according and in proportion to the number of shares expressed against their respective names; and that the said co-partnership should continue to be carried on in Sydney for the term of seven years, to be computed from the 1st day of July next ensuing the date of the now reciting deed, under and subject to the rules and regulations thereinafter mentioned: And whereas the said capital of £120,000, or so much thereof, as hath from time to time been called for or required, for the purpose of carrying on the business of the said Bank, hath been paid up and advanced by the said several persons, parties to the said deed, or their respective executors, administrators, or assigns: And whereas the several persons, parties hereto, whose names and seals are hereunto respectively subscribed, and set, are either as original parties to the said recited deed, or as the assignees or representatives of such original parties, possessed of, and entitled to, the whole of the capital stock of the said Bank: And whereas the said term of seven years being about to expire, the said several persons, parties hereto, have consented and agreed, to carry on the business of the said Bank, for the further term of one hundred years, determinable, nevertheless, as hereinafter is mentioned, under and subject to the rules and regulations hereinafter expressed and declared concerning the same: And whereas it hath been proposed and agreed, that the capital of the said Bank shall be increased to the sum of £200,000, to be held by the several proprietors thereof, parties hereto, in shares of £100 each, according, and in proportion to the number and amount of the several shares of £100 each, mentioned and expressed against their respective names and seals: Now these presents witness, that, in pursuance and performance of the said in part recited agreements, and for the purposes hereinbefore mentioned, and other the ends, intents, and purposes hereinafter expressed; they and each of them, the said parties, whose names and seals are hereunto respectively subscribed and set, for

themselves, himself, and herself, severally and respectively, and their, his, and her several and respective heirs, executors, and administrators, and as to and for their, his, and her own proper and respective acts and deeds; but not all or any of them jointly, nor any one or more of them for the other or others of them, or for the heirs, executors, or administrators, or the acts or deeds of the other or others of them, do and doth, by these presents, covenant, promise, declare, and agree to, and with the others and other of them, severally and respectively, their, his, and her, several and respective executors, administrators, and assigns, in manner following, that is to say:—

And then the first clause is,—

I. That they the said several persons and parties hereinbefore named, parties hereto, and the several other persons who shall hereafter be, or become parties hereto, shall, and will be, remain, and continue, co-partners and joint-stock proprietors of, and in the said capital sum of £200,000, or so much thereof, as shall and may, from time to time, be paid in and actually form the capital of the said company according and in proportion to the number and amount of the several shares of £100 each, mentioned and expressed against their respective names and seals hereunto subscribed and set, for the purpose of carrying on the business of the said company, under the said title, denomination, or firm of "the Bank of Australia," for and during the term or period of one hundred years, to commence and be computed from the first day of July now next ensuing; determinable, nevertheless, as hereinafter is mentioned, &c.

Now that is the object of this power; it is "for the purpose of carrying on the business of the said Company," and probably that is one of the parts of the deed which His Honor will put more immediately under your control, as among the mercantile expressions, and to which the plaintiffs might have applied evidence. I will now go through the marginal notes: as for the purposes of my argument I must exclude the possibility of your minds presuming that there may be something in the deed which I have not referred to, although I might be tolerably safe in coming at once to the clause upon which my learned friend relies. The learned gentleman read the whole of the marginal notes on the deed of settlement to the 51st clause. This is the first clause in which we come to the point that more immediately concerns us at present, and to this clause I believe my learned friend meant to refer. I am not aware that he read it, but he referred to it and is entitled to the benefit of it. He read more particularly the 55th, but this is the 51st clause:—

That such board of directors shall have, and they are hereby expressly invested with full power and authority to superintend, order and conduct, regulate and manage, all and singular the affairs and business of the said company, to the best of their discretion and judgment, under and subject to the provisions hereinafter contained.

There is their power. And you will observe that the whole of the words "superintend, order and conduct, regulate and manage," refer to the affairs and business of the company, whatever that may be. So that we shall have by and by to consider what are the affairs and business of the company as chalked out in this deed. That there is the general power given them that they are to "superintend, order and conduct, regulate and manage, all and singular the affairs and business of the said company." Then there follow a number of clauses which would at first sight appear to include matters which were already provided for as belonging to the "affairs and business of the said Company." But the proprietors by inserting them in the deed show that they consider they did not come under these first general words, for every deed is to be so read as that every part of it shall have a sensible meaning, and therefore it will be presumed that they would not put in something perfectly needless. You must not read any clause in such a way as would make it appear unnecessary that another should have been inserted, but must read all, so as to give all some kind of sense. Now what are the things which the proprietors have expressly appointed? What are the powers expressly given by the deed? That the board shall appoint and discharge officers, "purchase such books, furniture, utensils, and other articles, which they shall consider necessary for the conduct of business, and management of the affairs of the said Company." But it is manifest, even as regards these comparatively trivial matters, that the Company conceived it to be requisite to give express powers—that they did not come under the general management. And the thing will be plain to you, if you bear in mind the principles of the cases which I read to you yesterday, that the Company might exist without a single clerk or officer, because those proprietors who were appointed to manage and direct might perform all the duties themselves. It is not absolutely essential that any person should conduct his business by means of a clerk; no doubt it is common to do so, still he might do it himself. As the 51st clause, which invested the board with full power and authority to "superintend, order, conduct, regulate, and manage" the affairs and business of the Company, this clause was inserted. They then decide,

LIII. That such board of directors shall or lawfully may, from time to time, devise and make such provisions, rules, orders, and regulations, touching the government, carrying on and management of the affairs of the said company (the same not being repugnant to the general rules and regulations herein contained), as they shall think expedient.

Nothing turns upon that, I believe, either one way or the other. My learned friend does not pretend that there has been any particular rule passed by the Board of Directors, except that which he has put in as the ratification of Mr. Mackenzie's act and some others, and also with regard to the signing of notes, but that does not apply to this clause at all. Then comes the 54th clause, which is a very important one, shewing what was not contemplated as coming under the words of the 51st clause, that the board was to "manage all and singular the affairs of the said company." The clause runs thus—

That such board of directors shall have the entire management and control of the *lending* of moneys on bills, notes, bonds, mortgages, and other securities, and of the purchase and sale of bullion, gold, and silver, and such coins or moneys as they may consider necessary for carrying on the business of the said company, or as they shall think advisable and advantageous for the general interests thereof; and that they shall have the uncontrolled liberty, right, and power, of calling in, receiving, and enforcing payment of all moneys due and owing to the said company, whether such moneys shall be secured by any deed or deeds, or in whatsoever other manner the same shall be secured, due, owing, payable, belonging, or appertaining to the said company.

Well, there is in that 54th clause an express power to lend. No doubt about that, and no doubt they exercised the power thus given. If therefore the question were whether the directors had the power to lend, it could not be disputed. But what we contend is, that the power of lending being given in express terms, not only must the power of borrowing be given in express terms, but in terms as express. Very well, if the proprietors intended to give the power of borrowing in the same large way that they have the power of lending, what would have been easier than to have put in a clause similar to that which I have read—"That such board of directors shall have the entire management and control of the *borrowing* of moneys, &c?" If it was intended by the proprietors that their agents should have the power of borrowing money they would have stated so in express terms, but it happens that from one end of the deed to the other the word "borrow" is never mentioned. And unless my learned friends have recourse to the old device mentioned by Dean Swift, in his "Tale of a Tub," I do not see how they can make out their case. There the three brothers, when they wanted to put lace on their garments, looked into their father's will to endeavour to find some authority for doing so. No authority to wear lace could be found in words, but by picking out letters from different parts of the will an authority could be concocted. However, on examining the will still further, they found that they were expressly prohibited from wearing lace at all, whereupon, although they were anxious to abide by the will, if it was favourable to their own views, they sat it aside altogether. And I think my learned friend will act in a similar way; he will come in under the deed if he can, but when he finds he cannot, he will endeavour to persuade you to set it aside, and fall back on the supposed ratification by the shareholders. But at present my learned friend wishes to persuade you that there is in the deed an express power to borrow. All I can say to that is, that it is marvellous if it were at all meant by the proprietors that there should be a power to borrow, that it was not mentioned. However, when we come to the 55th clause, there is something which implies, I may admit, but does not express, a power of borrowing *sub modo*—of borrowing in the particular manner pointed out. But supposing that it is made out ever so clearly that the power was given expressly to borrow in this particular mode, that mode cannot be departed from. A person having power to borrow in a particular manner cannot borrow in another; he cannot say, "Oh, it comes to the same thing; the object is to get the money." He cannot go out of the mode prescribed. Let us see what the 55th clause says—

That such board of directors shall, from time to time, settle and determine in whose name or names all securities that shall be required to be entered into by or on behalf of the said company, or by or on behalf of any person or persons transacting or negotiating any matter or business whatsoever therewith, shall be taken and given, and by whom, and in what manner and form, and for what amount, the several cash notes of the said company shall be drawn, signed, given, and issued, and from time to time, alter and vary the same as they shall think proper.

Now my friends, in reading that clause, wished it to be construed with reference to a part of the preamble; and I readily admit that every clause is to be construed with reference to every part of the deed. I will read the part referred to: "That a bank should be founded and established in Sydney, as well for the purpose of discount and issuing of notes and bills, and *lending* moneys on securities and cash accounts; for the receiving of moneys on deposit accounts; for the safe custody of moneys, and securities for moneys; for the general public accommodation and benefit; as also for transacting and negotiating all such other matters and things as are usually done and performed relating to, or connected with, the ordinary business of banking." Now I am quite willing to take that, or any part of the deed, in connexion with the 55th clause; and my learned friends contend, that under the securities mentioned in that clause may be included security for money borrowed; and they then refer to the words in the preamble, which I have mentioned, where we are authorised to receive moneys on deposit. I will admit that receiving money on deposit by the bank is a *quasi* borrowing; that the Bank may be said, in effect,—in one view of putting it,—to borrow the money. But supposing it to be so looked upon, what does the deed say? That they shall borrow in that manner; that they may receive money on deposit; that they may issue their notes in the way of discounts and so may be said to lend money—but it is to be in this mode and no other—therefore, if you read this preamble, with the 55th clause, it will still have to be construed with reference to the particular mode pointed out, which is in point of fact one of the ordinary modes in which a banking business is conducted. His Honor will tell you that in construing a power of any kind, you must construe any general words, for instance these words, "or business whatsoever," which are large in themselves, with reference to the business pointed out—that they cannot be taken to enlarge the object for which the power was given. This was expressly decided in some of the cases which I cited yesterday, particularly in the case of Attwood *v.* Timmings. What then was the object of this power? To enable the directors to conduct, regulate, and manage, this joint stock business. It was clearly not intended to give the directors more power than a common partner had in an ordinary partnership. It is clear that the object was to give less power, to cut down the power. Even if you could not see this from the very nature and constitution of joint stock companies, it would be quite plain from the rule of law, that the expression of will on any particular matter excludes the possibility of implying anything beyond what is thus expressed. That is a maxim of law by which all instruments must be construed; and if the proprietors have pointed out a particular mode of borrowing, then that mode must be followed and no other. In reference to ordinary partnerships, it is very doubtful whether one partner can borrow money, even for the purposes of the partnership, without the consent of his partners. The danger is nearly as great in a common partnership as in a joint stock company, though that danger may be said to be met by the knowledge they have of each other, the mutual confidence they repose in each other, the faith they have in each other's integrity. But this, at all events, will appear from the authorities—that however doubtful it may be whether a private partner can borrow a moderate sum of money for the purposes of the partnership, and that does appear to be a nice point, it is quite clear that any such borrowing, or pledging the credit of the firm, must have reference to the nature of the business and the amount of capital embarked in it; and if there is any specified amount of subscribed capital, that of itself is sufficient to exclude the notion of the partnership designing that any other fund should be brought into the partnership business. At all events, it implies an intention to have a business only commensurate with that capital, and therefore to have liabilities commensurate only with that capital. We find in this deed a number of clauses limiting the liabilities of the shareholders, fixing the amount of capital, and actually providing means by which the capital of the company should be increased if necessary, which all tend to exclude the notion of obtaining money, even for the business of the company, in any other mode than that pointed out. The 56th clause of itself would appear to have this effect. It provides—

That should such board of directors at any time or times deem it necessary that a call should be made on the members of the said company for the payment of any part or parts of the capital subscribed by them as aforesaid, they are hereby authorised to call a special general meeting of the members of the said company, for the purpose of consulting on the necessity of making such a call, or give one calendar month's notice, at the least, previously to the then next general meeting, of their intention of submitting to the members of the said company such necessity at such next general meeting. And should the general body of proprietors, at such special-general or general meeting, consider it necessary or advisable that such call should be made, the amount of every such call shall be paid into the hands of such person or persons as the said board of directors shall appoint, within one calendar month next after such call shall be notified in one or more public newspapers, or at such other time or times as shall be appointed at every such special-general or general meeting.

The 10th clause shows what the directors might do if more than the subscribed capital was wanted for the business they were appointed to manage—

That the capital stock of the said company may, at any time or times, and from time to time, be increased beyond or above the amount of the said sum of £200,000, if the major part of the proprietors for the time-being of the said company shall think fit, and be raised either by an issue of new or additional shares to the then members of the said company, or in such other form and manner as the proprietors at a general meeting shall deem most expedient.

I shall have occasion hereafter to call your attention again to that clause, and especially the expression with regard to the power of a general meeting; but at present I merely bring it before you for the purpose of showing you that in several parts of the deed means are pointed out by which, if additional funds are wanted, they may be called for. These means being pointed out, exclude the power of raising money in any other way; they exclude any implication of increasing the capital by any other means than those which are so well defined. I utterly deny that in any joint stock company here can be any implication at all of such a thing, and the reason is this: that it would be utterly unreasonable to say that any association could be subject to rules that would necessarily destroy the association; the rules that govern it must imply its existence—that it should go on; the rules are for the purpose of keeping the association together—the rules are for carrying on the association. And I cannot find words to express the absurdity of supposing that any association can be under rules which would necessarily prevent its existence. It is impossible, therefore, to imply a power, which, to use the words of Mr. Justice Bayley, "would extend to the entire fortunes of every individual member." No man would enter such a company if the directors could have such an implied power—no person, unless he were a madman, would unite himself to such an association. This principle applies particularly to the borrowing of money, and I would ask, which of you would take any dozen men, much less any two hundred men, of whom you had perhaps no knowledge, and give to them an authority to borrow money, and bind you to the extent of all your property? The existence of such power over him would be enough to make any reasonable man shudder. The deed then goes on to say, "That the directors may bring and defend actions," and so forth, showing what the directors are to do, and pointing out what they can do; and I do maintain that when you come to look through the deed, you will find that there is provision made for carrying on the whole business of a banking company without the power of borrowing; that there is no single thing omitted that is essential to the existence of this joint stock company as a banking company. I have never heard of, or found reported in the books any case—we have had no evidence from any banker of any power having been used by a banking company in the way it has been used here. The company can go on it is manifest without such power, and if it can go on, if it is not essential to its every day working to have the power of borrowing money, the fact of a contingency arising which made it a convenient thing to borrow money will not change the position,—for His Honor will tell you that no subsequent occurrence can operate to vary a power previously given and defined. All depends upon that point of law. If there is a power to borrow money it must be given in express words, and I say there is no such power given, that the power given to grant securities, is a power given to grant securities for perhaps twenty things, in the ordinary and every-day concerns, and under the circumstances here pointed out; but it is not a power to borrow money, and it would appear to be straining this deed in a way that a deed never has been strained before to imply such a power from these words. I believe it appears from the original deed, I have not looked at it, but it certainly appears from the evidence, that the capital was increased beyond the sum of £200,000, that it is now £220,000. And I believe it will appear on the face of the deed that the mode here pointed out was followed; that every proper form was gone through when the company required an increase of capital. So important was it, that the proprietors were called upon to agree to the increase of capital. [The original deed was handed to the learned gentleman.] Here it is: "At a special general meeting"—

The Solicitor General: You do not call that a part of the deed?

Mr. Windeyer: In point of fact it is the existing deed, for it is re-executed by, I believe, all the proprietors. It was thought so important by my learned friend, that he put this original in evidence, and it was considered as read.

The Solicitor General: Not that part.

Mr. Justice Dickinson: I really do not think so—it appears to be something written upon the deed.

Mr. Windeyer: However it does appear independently of that, which I will not refer to, for reasons obvious to us at the bar, although you, gentlemen, may not see them. My referring to a new fact might cost us another six or seven days. It sufficiently appears, however, from the evidence before you, that our capital has been increased beyond £200,000, and I contend that it could not have been done in any other way than that pointed out by the deed. In point of fact, the whole operation would have been illegal, if it had not been so done. It is sufficient for me to show that that mode is pointed out, and that having been expressed and pointed out, no other can be had recourse to. The Solicitor-General placed much stress upon the directors being enabled "from time to time to settle and determine in whose name or names all securities that shall be required to be entered into by or on behalf of the said company, or by or on behalf of any person or persons transacting or negotiating *any matter or business whatsoever*." "Any business whatsoever," means any business that they are authorised to enter into. These general words are, in point of fact, to be construed with the rest of the deed, and with the authority there given. A joint stock company is formed with a capital of £200,000, then what we say is, that the directors were put to manage that capital—that was their business—the object for which they were appointed. And although, in the case of an ordinary partnership, it may be said that each partner has in effect, the power of binding his partners beyond the amount of capital he puts in; that cannot be said with respect to joint stock companies, unless the power is expressly given, which it is not. They have the power to manage our £200,000 in such a way as may obtain credit for the Bank—in such a way as to obtain deposits without interest, or at a low rate of interest, and with these discount bills and notes at a higher rate of interest, and so make a profit. But they have no power given them to assist Hughes and Hosking, or any other distressed individual, by borrowing money for them. If such a power existed at all, they might as well have borrowed a million of money, which I suppose would be about the sum necessary to relieve all the distressed Hughes and Hoskings about the town. That argument would be most monstrous, but it is an argument which my learned friends must contend for, if they are to succeed at all. Now, you will observe, that I am doing what I have no business to do—I am seeking to make out a negative to show the absence of a power; but it was for my learned friend to show the affirmative of the proposition. It is for the plaintiff to make out his case. If so monstrous a power as he contends for is to be included in general words, it was for him to "call witnesses to show," to use the words of the Judges, in the case of Dickenson *v.* Valpy: "that other similar institutions were in the constant habit of exercising similar powers." That was his business; and no doubt, if any affirmative evidence of this fact could have been given, he would have given it. I am entitled to assume that no such evidence can be given. Perhaps my learned friend will say that the witnesses have proved there is no one in the colony who could give such evidence. Mr. Macarthur was asked whether he had been brought up to the business of banking. He said he had not, and did not think that any of the bank directors in Sydney, except the managers of the two English Banks had been brought up to the business of banking. Then Mr. Hart, one of those very managers, was placed in the box; and he said, that he had not been brought up to the business of banking. I dare say Mr. Hart is an excellent and intelligent merchant, well acquainted with the ordinary business of a merchant's counting-house, and perhaps accomplished in all the wiles of eastern diplomacy; but it does not follow that he is acquainted with all the rules of the banking business. Every business has its own mystery, and I cannot see why a man can pretend to be a banker, because he has discounted a few bills, any more than one can pretend to be a chemist because he has taken a few doses of physic. It may reasonably be presumed, from these facts, that all the bank directors of Sydney are somewhat deficient in the more abstruse branches of this trade. Such a state of things is one of the consequences of being in a new colony. What is the condition of most of us when we land here—most of us land poor, (at least I know that I landed poor enough,) we have never had large sums of money at our command, few of us have ever been possessors of land. The natural riches of the country soon enable us to accumulate property, to become wealthy traders, merchants, bankers, and landowners. The consequence of our sudden change of circumstances is, that the Supreme Court has a greater amount of litigation in it than half the northern part of England with a hundred times our capital and population. The fact is, that we have become possessed of property, before knowing the law that applies to it. The man who has never been anything but a labourer at home, suddenly becomes a farmer or landed proprietor, and it is not to be wondered at if he make mistakes in distraining for rent, or if he does not understand the law of ways and rights of easement. So with respect to the matter of the Banks, a large number of persons who possessed money in the colony, thought it desirable for their own convenience to establish a bank, but none of those had ever been bankers; and therefore it is no great marvel if they should fall into serious mistakes. Indeed it is actually on record that up to about three years ago the printed notices of dishonour that were given by the Banks, that were taken as notices of dishonour, upon which many persons had been forced to pay large sums of money, that these trumpery pieces of paper were no more notices of dishonour than they were promissory notes themselves. These were actually gravely circulated as notices of dishonour, and it was not till the difficulties of the colony commenced, about four years ago, that it was discovered these wonderful Banks did not know how to give a common notice of dishonour. It then suddenly struck a clever attorney of this Court, to try whether these were what they had always been considered to be, and I believe I had the honour to be the first barrister who was applied to to give his opinion upon them. When I came to consider them, although I must confess that I had with my neighbours regularly passed them in Court as notices of dishonour, when I was asked the question direct, and examined into the matter, I found they were not notices of dishonour at all. The result was all those defences to actions, on the ground that the defendants had not received due notice of dishonour, which were so rife a few years back. The Banks have now altered their notices, the directors having learned something more of the business of banking. As we progress in misfortune, we shall learn still further our proper business; and I do believe that the present case will act as a salutary lesson to the Banks to confine themselves to the proper sphere of their business; although it is right to say that it does not appear that any of the other Banks have followed in Hart's course, but have all confined themselves to such dealings with our directors as are allowed by the deed of settlement, namely, that of discounting, or rather re-discounting, the bills belonging to us. I will now call your attention to the difference between a general power to borrow, and the power to borrow according to the mode prescribed by the deed. The difference is this: if we discount bills, and want to raise money by re-discounting, we shall exercise a proper caution in taking the bills, and shall discount them according to ordinary banking rules, preserving a certain proportion between the amount used in discounts and the money in the chest. In short, we should not give away our capital to those who may be directors, but who are in too great haste to be rich, who are anxious to make fortunes by some short cut other than the ordinary road, who are willing to hazard the money of the Bank in their own speculations, without calculating very closely how it is to be repaid, if this speculation fail. In discounting in the ordinary way, if bills are presented from persons who have already got too much paper in the banks, or whose names are already dishonoured, they would be carefully rejected. Suppose this ordinary rule of banking had been followed, although the directors had so forgotten themselves, as it appears they have done, as to appropriate the money of the Bank to themselves; had they agreed to take Hughes and Hosking's bills according to banking rules, the proprietors would have been bound, but the operation would have found its own limits of banking. I apprehend, that it is against all the rules of banking to discount paper of merchants who do not take up their bills, whose names are to dishonoured notes in every Bank in the town. But supposing that the directors had chosen to be guilty of gross imprudence by violating that rule, although they might have done much to ruin the capital of the Bank, they could not have gone beyond a certain amount. But if they are to identify themselves with Messrs. Hughes and Hosking's affairs, and to borrow £150,000 for them, why should they not relieve the circumstances of every person in the colony, if they can do so by borrowing? The substantial difference between borrowing money by receiving it on deposit, and afterwards discounting bills with it, and of borrowing money in the way we are here said to have done, is manifest. If it were allowed in the way we are said to have done it, no joint stock company could exist but in the way it is here given in the deed; there is a certain point beyond which in the nature of things their responsibility cannot go, and that is the degree of authority with which we were willing to entrust the directors,—beyond that we have not gone, and would not go. Therefore we say we are not bound.

The grand argument of my learned friend, that we must absolutely have stopped if it had not been for this loan, has nothing to do with the matter; because it does not appear that it prevented, or was it intended to prevent, our stopping. The plaintiffs did not lend us the money to enable us to carry on the business; and you will remember in the case I quoted yesterday, it was decided that even if a partner had power to borrow money, it must be for the purpose of carrying on the business of the partnership. But here it was not lent to enable us to carry on the business—on the contrary, it was an express understanding that the Bank was to stop. My learned friend said we were about to stop; then we might certainly as well have stopped without incurring this additional liability. But my learned friend urges farther in this matter, that we had got into such a state that it was of vast consequence to us that we should get the money. We had been brought into that extraordinary position by the improper conduct of those to whom the management of the Bank had been entrusted, and I state broadly to you, that it is not because the company cannot go on without the money that the directors are entitled to borrow it. The question of authority is not affected by anything that takes place after the authority is given. If no authority is given at the time the deed is signed, no authority can be raised by what afterwards takes place, and his Honor will tell you, that you are to look to this deed for authority, and not to any subsequent wants of the Bank. That the Bank could be carried on without this power is proved by its having been carried on without it—it never wanted it before; and supposing even that the Bank would have stopped but for this loan, that would not justify the directors in what they did, any more than if they had put the money into their own pockets. It was for the plaintiff to show that the constant issue of joint stock banks was in his favour, if we are to imply authority at all; and although there are apparently no witnesses in the colony competent to tell us how these mercantile clauses are to be interpreted, it is quite clear that the plaintiffs might have got a commission to England, and have examined bankers from all parts of the world. If it be suggested that we also might have applied for a commission, and have attempted to establish the negative,—though it is their business to establish the affirmative,—my answer is, that it does appear from a case bearing the same name as this, decided a few weeks ago in this Court—I will not say it was the same case, lest my learned friend the Solicitor-General, should call upon me to prove it—it does appear that the defendant did apply to the Court for a commission to examine London witnesses, urging the very ground that now appears in evidence, that there is no person in the colony who can give satisfactory evidence on the point. The Court refused to grant the application, no doubt very properly; although I cannot help suspecting myself, that not being mercantile men, and perhaps a majority of them having taken up very honest notions, there was a slight bias in their minds, arising from the notion that they would be thought to sanction the "repudiation"—that big word which my learned friend has dwelt upon so much. It is possible that this deterred them from what appears to me to be an act of justice, and induced them to act as people do who are afraid of being thought afraid. However, I have no doubt they did what they thought was just and proper, and it is right to admit that although counsel may be dissatisfied with the decision in one point of view, yet that in another it may be supported. Now I think that the decision may be supported on this ground, that it was not the business of the defendant to give this evidence, that it was the business of the plaintiff. The Court would not listen to the statement that satisfactory evidence could not be given because it might be thought to imply that the gentlemen who were employed as bankers in Sydney, being interested in the matter, would not give fair evidence before a Jury. Their Honors no doubt thought that the plaintiff whose business it was to show the affirmative, would call all the bankers in the town to establish his position, and to a certainty he would have so done, if he could thereby have established it. It may be said, "You, the defendant, might have called all the bankers in town to establish the negative." Possibly we did send to them a statement of the facts, according to Mr. Hart's own view of them, and subpœnaed them to give evidence upon it, as far as their opinion and knowledge of banking went. I do not know whether that is the garbled correspondence at which my learned friend was so indignant; but after Mr. Macarthur's evidence—after hearing the head of the banking institution say that he does not know any thing of the matter, and that he does not know any one who is acquainted with the business, except the heads of the two English Banks, I think we may be excused attempting to prove the negative. The managers of these Banks when called in would probably say, "It is true we are managers of the Banks, and have been placed here by the directors; but we know nothing of the usages of bankers, we are all 'new chums' here, and have not conducted banks at home." And the directors might say, "We have been obliged to take offices upon ourselves, with the duties of which we are unacquainted; we can merely say that we have done so and so—and we have never been engaged in such transactions." Can we do otherwise than think if any party connected with any of the Banks could have shown that they had lent money in this way we should not have had them put in the box? There can be no reason why the plaintiff should not have put such a witness in the box, and there is no reason why we should, because it is the negative we have to prove. If I were to call evidence, it is probable that you would be kept here three or four days more, to give us what I admit would be a great pleasure, the opportunity of hearing my learned friend Mr. Manning again; but as it would be a purely forensic pleasure, it would not be right to force it upon you. Before quitting this point—the difficulty of finding witnesses in Sydney acquainted with banking—I would call your attention to Mr. Macarthur's own endorsement. I have very little doubt myself, although that cannot influence your minds either in one way or the other, that it *was* meant by the minute of the Board of Directors to authorise Mr. Macarthur to sign bills, notes, and endorsememts, in the same way that Mr. Falconer and Mr. Norton have done. Mr. Norton, who did know how to sign a note by procuration, had written "for the Bank of Australia;" but Mr. Macarthur's knowledge of banking is so small, that he wants the same instruction as to how to sign a note that all the banks wanted a few years ago, in order to know how to give a notice of dishonor. And even in that instance there was not greater ignorance of banking matters shown than in the case before us. I do not mean by that to cast any reflection upon Mr. Hart, nor do I mean to say whether he knew better than those he dealt with; but whether he did or not, his own securities and customers were in such a state, that it suited his interest to run the risk he did of getting his money back circuitously, for the purpose of fixing the proprietors of the Bank of Australia in such a position as to make it expedient for them to offer terms of compromise rather than risk their all in an action. And no doubt he has gained by the transaction—I will freely admit that we were prevented from suddenly stopping; Hughes and Hosking were prevented from suddenly stopping, and thereby all those vast interests depending upon them were afforded an opportunity of collecting their assets, and had time given to meet their liabilities, all that has been gained by the community, and Mr. Hart has had his full share of the benefit. There can be no doubt that his share of that general benefit has been to his Bank worth all the money he has paid out, even if he does not, which I am certain he will, get all he is entitled to from us. He did the best that was to be done for his Bank, and must have believed, with Mr. Norton and the other directors, that even if this act were irregular—if the directors had not power to bind the proprietors by it, there was very little chance of its resulting in loss. All the parties who acted in this irregular manner no doubt thought that the property of Hughes and Hosking was sufficient to cover every thing; and if that had continued to be the case, we should, you may be sure, have heard nothing of this action. But however little objection the proprietors may have had to let Hughes and Hosking's property go, as in equity it ought, to discharge this debt, they had great objection to pay out of their own pockets the deficiency, if any there is to be, arising out of a contract they did not authorise. Therefore it is that we fall back upon the principles I have mentioned.

We have seen what course the learned Solicitor-General might have taken; let us now consider the one he has taken. He began by citing to us a passage from M'Culloch, showing us, very much to our edification, that Banks did not make profits merely from employing their own capital, but by obtaining deposits at a low rate, and lending out at a higher rate of interest. Now, while he was reading from this book, he might as well have cited M'Culloch's first sentence, which is this, "Banks are establishments intended to serve for the safe custody of money, to facilitate its payments by one individual to another, and sometimes for the accommodation of the public with loans." Banks are here supposed to be institutions having money subscribed by one individual, or by many, which is to be lent out to the *public;* but it is not contemplated that they themselves should be borrowing institutions. Even in the very preamble of this deed, that my friend relies upon so much, after saying that the Bank shall *lend* moneys, it does not go on to say that they shall also borrow, but that they shall take deposits; no doubt that is a kind of balancing of the sentence, which shows that if there is to be any kind of borrowing to be set against the lending, that is the only kind there is to be. But a more correct definition to the business of a banker than that of M'Cullock, is to be found in a work of great legal value; I mean M. Pardessus's volumes on Commercial Law.

The Solicitor-General: Oh!

Mr. Windeyer: My learned friend the Solicitor-General does not seem to approve of his authority, I suppose because he is a writer on foreign law; but to reconcile him to my friend's mind, as far as possible, I have no objection freely to translate his name as well as his words, and call him Mr. Uppercrust. Notwithstanding my friend's deprecatory interjection, you will find upon looking at the foot-notes of any English writers on Bills of Exchange and Commerce, that M. Pardessus is always quoted as an authority upon the general principles of the Law Merchant, which are necessarily the same all over the world. In page 39 of his first volume, having already treated of different institutions for facilitating commerce, he comes to the operation of Banks, and he says:

All the transactions, the elements and table of which are shown in the preceding section, require multiplied researches, and suppose an habitual knowledge of the chances favourable or unfavourable, which circumstances produce. The care of foreseeing these chances has become a branch of industry which consists in studying the resources or the wants of different places, and in calculating the chances which may result from them, chances which are the more complicated from the inequalities between the intrinsic and nominal value of money being joined to a greater or less abundance, and to a greater or less extent of wants; all increasing the difficulty of knowing the profit or the danger attending particular speculations. Those who follow this branch of industry are called Bankers. Their profession consists in selling or buying in one place, the power of disposing of sums of money payable in others.

Now, gentlemen, if you will take the trouble, as a matter interesting you as mercantile men, and considering the terms of that definition, you will find it is quite correct. It struck me in reading it, that the latter part of the passage should run, "the faculty or power of disposing of sums of money payable in the same or other places," but on consideration it will be quite clear that the passage I have read defines the whole of a banker's operations, because the word "place" is not to be construed with reference to any particular town. We are to understand by the latter part of the passage any change of locality, however trivial, thus, if I give a cheque to a person at my house in Elizabeth-street, payable at the Bank in Hunter-street, it is, in point of fact, the disposal of a power to receive money in another place, and even if I were to give the cheque at the counter of the Bank to a person who had given me value for it, the definition would still be correct, because that would still be disposing of a power to receive money at another place than that where I was actually standing. It is not because this writer is a Frenchman, that you are to disregard his authority, because the law-merchant is universal. There are in different countries, I admit, variations in the law-merchant, but they are comparatively trifling, and it would be manifestly impossible that mercantile operations could be carried on as they are, if the law was not pretty much the same all over the world. Wherever mercantile operations extend to, the law-merchant must follow them. If we go to China, where it has never been heard of, we must take it there, and in countries where the law-merchant is acknowledged it will be administered, subject only to the particular local modifications of the country. Now, I must admit that there are some modifications of the law-merchant in France, even with regard to the particular matter we are discussing, which make it in some few particulars different from the law of England; but they are differences favourable to ourselves on this occasion, as I shall have occasion to cite this work [illegible]ter, and you will see that the modification of the French law goes to make the power of directors in France greater than in England; but even the power of a director in France does not come up to what is contended for here. The definition here given then, is, that the profession of a banker "consists in selling or buying in one place the power of disposing of sums of money payable in others." Then the mode in which it is to be done is to be found out by every person or society that enters the business. If any one person sets up in the business of banking, he is bound to act up to the general rules, unless he promulgates some limitation to each particular customer; but in associations that is not necessary, it is sufficient

that the conditions by which they are bound are put in the deed, and which the customer, knowing that the immediate parties he deals with are only agents, is bound to ask for, to look at, and not to go beyond. But we need not look for any definition of the business of a banker, or for what powers can be implied under their general business, as my learned friend contends that here is an express power. No doubt he must feel that that is the argument which it is necessary for him to urge, and that no Court or Jury would tolerate for a moment the idea that such an immense power might be implied. It must be expressed, and he contends that it is so, therefore we may put aside all authorities that do not touch that point.

But in order to show you that the construction I have put upon this deed is the true one, that the mode in which I say it is to be read is the true one, I will, as I did yesterday, give you what I submit is a corroboration of these positions. In Story on Agency, page 51, there is a passage which applies to the matter I have now dwelt upon,—

And not only are the means necessary and proper for the accomplishment of the end included in the authority, but also all the various means which are justified by the usages of trade. Thus, if an agent is authorised to sell goods, this will be construed to authorise the sale to be made as well upon credit as for cash, if this course is justified by the usages of trade and the credit is not beyond the usual credit: for it is presumed that the principal intends to clothe his agent with the power of resorting to all the customary means to accomplish the sale, unless he expressly restricts him. In other words, he is presumed to authorise him to sell in the usual manner, and only in the usual manner in which goods or things of that sort are sold. The same doctrine is recognised in the civil law: for by that law agents might do whatsoever is comprehended within the letter thereof, procuration, and the intentions of the principle deducible therefrom; and whatsoever naturally follows from the authority given to them, or is necessary for the execution of it." In a subsequent passage the writer goes on to say: "On the other hand, language, however general in its form, when used in connexion with a particular subject matter, will be presumed (as we have already seen) to be used in subordination to that matter, and therefore construed and limited accordingly."

So these words therefore, "any business whatsoever," are to be construed in subordination to the other authorities given. It means, "any business whatsoever" in connexion with the special power already given, and none other; and, therefore, they are to be "construed and limited accordingly."

And it will make no difference in the construction, that this general language is found in very formal instruments, such as a letter of attorney. Thus where a power of attorney authorised an agent "to ask, demand, and receive, from the East India Company, or whom it should or might concern, all money that might become due to the principal, on any account whatsoever, and to transact all business," and on non-payment to use all lawful means for the recovery, and on payment to give proper receipts and discharges, with power to appoint substitutes, and giving his the (principal,) full power and authority, in the premises, with the usual clause of ratification; it was held, that the words "to transact all business," did not authorise the agent to endorse an East India bill, received under the letter of attorney in the name of the principal, and to procure a discount thereon, on such endorsement; for the words "all business must be construed to be limited to all business necessary for the receipt of the money."

Now it was *not necessary* for the receipt of the money that the bill in that case should be endorsed and discounted, for it might be received when due. Even if the agent should have learned that the parties who were to pay the money were likely to become insolvent, he would still not have been authorised to endorse the bill without fresh authority of his principal; and for this reason, that when the authority was given with these large words, it did not contemplate the happening of the contingency that the party who was to pay the bill would become bankrupt; and, therefore, although that might make it expedient to endorse the bill, still it was held that the agent could not do it, however beneficial to the principal's interest. The question as to the authority of these words—"all business whatsoever," and "'all business,' must be construed to be limited to all business necessary for the receipt of the money." Then again at page 56, section 68, "Indeed formal instruments of this sort are ordinarily subjected to a strict construction, and the authority is never extended beyond that which is given in terms." Now where is the authority given in terms? The authority that is given in terms is to lend money, to receive money on deposits, and to discount bills; but where is the authority given in terms to *borrow* money? "And the authority is never extended beyond that which is given in terms, or is necessary and proper for carrying the authority to sell and assign into full effect." Not for meeting any particular contingency or distress of the Bank. They may construe this instrument so as to enable them to take deposits to discount bills with those deposits, and I should think it possible that they might even re-discount the bills without express authority, because it is in bills so obtained that they are expressly authorised to trade. But we need not consider that question now, the only question is as to the authority to borrow money, and you are not to imply any authority beyond that given in terms Then again at page 69—

In written instruments also of a less formal character, the like construction generally prevails: and they are never interpreted to authorise acts not obviously within the scope of the particular matter to which they refer.

Therefore these words "any business whatsoever," cannot be construed any more than in the East India case referred to, to mean all business; but must be construed with reference to the scope of the particulars matters to which they refer:

Thus, when upon the dissolution of a partnership, notice was published by the partners, that all demands upon the firm would be paid by a particular partner, "who is empowered to receive and discharge all debts due to the said co-partnership;" it was held that this did not authorise the partner after the dissolution to endorse a bill of exchange in the name of the firm, though drawn by him in that name, and accepted by a debtor to the firm.

It happens in a particular case to which I shall here refer, Kilgour *v.* Finlayson, that the money was actually applied to the business of the firm by the partner who was left, and authorised to pay all the debts; and it cannot be contended that the authority of the directors was greater than that; that they were to do more than pay all the debts. But I contend that their authority does not even go so far as that. In the case of Kilgour *v.* Finlayson, this is the marginal note. Kilgour *v.* Finlayson, 1 &c., Henry Blackstone Term Reports, page 155, "On the dissolution of a partnership between A., B., and C., a power given to A. to receive all debts owing to, and pay those owing from, the late partnership, does not authorise him to endorse a bill of exchange in the name of the partnership, though drawn by him in that name and accepted by a debtor of the partnership after the dissolution: so that the endorsee cannot maintain an action on the bill against A., B., and C., as partners. Neither can such indorsee maintain an action against them for money paid to the use of the partnership, though in point of fact the money raised by discounting a note which he had given (in discounting a bill) be applied by A. to the payment of a debt due from the partnership." In case you should have been led away upon these points by any of the mass of evidence that tended to show that Mr. Mackenzie's acts had been going on for some time in the manner which is now alleged to be at variance with the limitations of the deed, and you should suppose we are to be bound by the continued acts of our agents, I will refer you to a case which will prove that those acts do not affect the question. It is the case of Hogg *v.* Smith and others, 1st Taunton: "A power of attorney to receive all salary and money, with all the principal's authority; to recover, compound, and discharge, and to give releases, and appoint substitutes, does not authorise the attorney to negotiate bills received in payment, nor to endorse them in his own name; nor does a power to transact business. Evidence of an usage at the Navy Office to pay bills endorsed by the attorney in his own name, and negotiated by him under such a power, cannot be received to enlarge the operation of the power." So the acts of Mackenzie, and the acts of the directors of this Bank, cannot be received in evidence to enlarge the power given them by the deed. What we are now doing is reading this deed, and seeing what it means; therefore all the evidence put in by my learned friend has no bearing upon that question; and I do not think it was intended to have that bearing; I rather think it was intended to show a ratification, to which it will not have reference, for reasons that I will show by and by. But the general principle by which this deed is to be interpreted—supposing we could look at all for any implied power, which I deny,—is laid down in Story on Partnership, page 165. This is in common partnerships, and you must bear in mind the distinction between common partnerships and joint stock companies:—

The limitations at the common law, upon the authority of such partner to bind the partnership, may be readily deduced from what has already been stated. The authority can be exercised only in cases falling within the ordinary business and transactions of the firm, where the other party has no knowledge or notice, that the partner is acting in violation of his duties and obligations to the firm, or for purposes disapproved of by the firm, or in fraud of the right thereof. In the first place, the authority to be valid must be exercised in cases within the scope of the ordinary business and transactions of the firm. Thus, for example, in cases of factorage, it is a common, although not an invariable usage, to guaranty the solvency of the purchasers on sales made by the factor, and to receive thereof a commission *del credere*; and this would be deemed an authority within the scope of a partnership formed for factorage purposes, although it would not be shown that the partners had stipulated for that power in their articles of partnership, or even if they had excluded it by such articles, if it was unknown to the principal for whom they were dealing. So it is the common course of business for persons engaged in the purchase and sale of horses to give a warranty on sales made by them; and therefore a warranty made in the course of such business by one partner would bind the partnership, notwithstanding the articles prohibited such warranty, if the purchasers were unacquainted therewith. On the other hand, where it is not the common course of the business, in which a partnership is engaged to give letters of guaranty or of credit, if one partner should give such a letter of guaranty or credit, it would not be binding on the firm, although given in the name thereof. For the like reason, if one partner should in the name of the firm make purchases of goods, not connected with the known business of the firm, such purchases would not bind the partnership. Thus, for example, if a partnership is engaged in the mere business of selling dry goods by wholesale or retail unconnected with navigation, a purchase of a ship by one partner in the name of the firm would not be binding on the other partners, unless they should assent thereto. So, if persons are engaged in the mere business of tallow chandlers as partners, a purchase of a cargo of flour, or of pepper, or of coffee, or of other things by one partner, wholly beside the business of the firm, would not bind the other partners. But if the articles were such as might be applied or called for in the ordinary course of their business, the purchase of such articles would bind the firm, even though they were unnecessary at the time, or were bought contrary to the private stipulations between the partners, or were not designed to be used in the partnership at all, if the vendor were not acquainted with the facts. The real difficulty in many cases of this sort is to ascertain, what contracts, engagements, and acts, are properly to be deemed within the scope of the particular partnership, trade, or business; for these are not exactly the same in all sorts of trade or business; on the contrary, in many cases rights, powers, and authorities, over the partnership property and partnership concerns, exist either by usage or by general understanding, or by natural implications which are wholly unknown in others. To answer the inquiry then, satisfactorily, it is not enough to show that in other trades or other business, certain rights, powers, and authorities, are incident thereto, and may be lawfully exercised by each of the partners; but we must see that they appropriately belong to or are by usage or otherwise implied or incidental to the particular trade or business in which the partnership is engaged

This, gentlemen, is the law; even with respect to ordinary partnerships, there is this limit upon their transactions. But here we have the case of a joint stock company who have a deed, the existence of which is known to the other side, and you now see the reason why I pressed so strongly yesterday, the fact which I wished to establish, that this is a joint stock company governed by a chairman and board of directors under a deed of settlement, which deed was known to the other side. Once establish that, and you exclude all the authorities as to implied powers, that apply to common partnerships. I will not at this stage, further dwell upon the necessity for this mode of construing this settlement. You have only got to put it to yourselves—to ask yourselves how you would like to enter into a joint stock company—useful as they are, whether you would enter into one at all, when you had given express instruction as to what the authority of the directors should be, it could be construed into a power of borrowing to an extent that would involve the whole of the fortunes of every person connected with it.

Having now laid the power before you, and having as I trust satisfactorily shown that the plaintiffs must stand or fall by this power—that they have nothing else to depend upon, having shown how it is to be read, and having shown to what it really applies, let us look to the transaction itself, let us look to what the act is—I say it broadly, I lay it down as a proposition beyond dispute, that there is no direct authority to borrow at all; but supposing that there is an implied authority to borrow money, it must be subject to the limitations we have seen mentioned in the books, as being for purposes within the ordinary scope of the partnership business. I have now to maintain that the transaction out of which this action arises was not for the purposes of the Bank of Australia, nor was it in the usual and ordinary course of banking business in any bank, but least of all in a joint-stock bank. We have only got to look at the contract itself, it only requires a bare reading, bearing in mind how it is to be read, to see that the directors could not have the power to make that contract. But I will, after having read it to you, produce one or two authorities (those which I have already produced have been general, and have applied to all transactions) which apply to our precise position. So that you will not be left under His Honor's directions to apply the general principle to this deed and transaction, but will see, when the transaction is stated, and the authorities that bear upon it are brought before you, that the very thing here bargained for, and the condition imposed upon the Bank by this contract, render it impossible for the directors to enter into it. First of all we may take it as evident, if all the proprietors are to be bound by this contract, that it amounted to what is called a legal fraud; which does not at all mean that there was any design of cheating in the ordinary sense of that word; but it means that an advantage which the law would not allow, was attempted to be obtained, or would be obtained, by the particular construction of the instrument in favour of one party over another. Being in that sense a legal fraud, we are entitled to see what was the secret object of the parties; what was their motive; what was their understanding, besides what is expressed in this paper. Now we have it in the evidence of Mr. Hart, and I must do that gentleman the credit of saying, not only that he has fought a good fight for his Bank, that he has done all he can for his constituents; but that he has done all fairly and openly. He says in effect, "If I have made a mistake I will make known all the facts; I do not wish to conceal anything whatever," and I believe that he has given all the facts that took place in the negotiation of this matter to the best of his recollection. He never did that which, whether from a desire to conceal or suppress, or out of his great zeal for the Bank, that ready, over-willing witness, Mr. Falconer, did, from thinking perhaps it was part of his duty to make out the case of the Bank. Mr. Falconer gave his answers in such a manner, that it made me quite regret having to cross-examine him. Mr. Hart himself deserves every credit that can be given him, for putting his case before you in the straightforward manner he did, and leaving, as a man of honour and a gentleman should do, the law to take its course. That gentleman's statement with respect to the negotiation is this: he states that it was distinctly understood that the Bank of Australia was to have this advance upon the condition of its identifying itself with, and winding up the affairs of, Hughes and Hosking. That is an illegal condition, that understanding is an illegal understanding—it is an understanding that the directors were not authorised to come to—they were appointed directors to manage the business of the Bank, and not to enter into shipping and whaling transactions—not to enter into contracts with the government or any of the other heavy transactions of Hughes and Hosking. They are not authorised by this deed, by any contingency into which the Bank might be brought, to enter into Hughes and Hosking's affairs. They are not authorised by this deed by any contingency into which the Bank might be brought, to enter into Hughes and Hosking's concerns, still less to identify themselves with them. Then again, he gives it as it took place in several ways, it was part of the understanding that the Bank of Australia should incorporate Hughes and Hosking's and J. T. Hughes's affairs with their own, and for this purpose it was said that £150,000 would be required. It was distinctly understood, he stated, by the two Banks, throughout the whole course of the negotiation, that the Bank of Australia was to undertake the sole management and control of the affairs of Messrs. Hughes and Hosking, and the individual partners of that firm, as a trust confided to it, and not for its own benefit only, but for the benefit of the creditors of the firm generally. Now I am not aware that the proprietors of the Bank of Australia had given any authority to the directors to identify the affairs of the Bank with those of Hughes and Hosking, and to wind up their affairs jointly. The directors had got no power to wind up their own affairs, still less in conjunction with Hughes and Hosking's; I do not see anything of this in the deed. In engaging to wind up the affairs, and to identify themselves with Hughes and Hosking, it is plain and manifest that they went beyond their power. But that was the understanding with which the contract was entered into. It is possible that those who dictated this contract thought it expedient to keep it out of the contract itself; but it once appearing that it is the understanding, it does not signify that it is not named in the contract, in fraud of the rights of the body of proprietors. But there are some parts of this engagement so vital to the object Mr. Hart had in view, that they were embodied in this paper; although motives are put in the front of the battle, which, if followed out in the way directed by the deed, might have been legitimate. The first words sound, in the first instance, as if they would come within the terms of the deed, but when we take the contract altogether, and its effect altogether, we see that it is quite opposed to it—you are not to look to any particular part that may have been put in by a clever attorney to cloak the rest, but to take the whole; with respect to the origin of these conditions, they would appear at first to come from our Bank, but Mr. Hart candidly states that he made these conditions, and indeed it will be manifest from their nature that even our directors would not have offered them. Supposing, however, that these our agents had offered them, it would be of no consequence, because the contract is equally unlawful from whichever side it came. But it appears, in fact, that Mr. Hart made these conditions, and we cannot doubt when he said he noted them down, and showed them to our directors, before he took them to Mr. Maclaren, that he drew them for his own purposes. Our letter of the 27th February, 1843, shows the contract thus: "In reference to the communications which have taken place between the directors and cashier of this Institution and the Bank of Australasia, relative to the intended alteration in the business of this Bank, and the assistance it will require for the purpose of meeting its immediate liabilities, I am directed by the Board to communicate to you their resolution of calling a meeting of the proprietors on the 16th March next, for the purpose of making the necessary arrangements for terminating the business of this Bank, and converting it into a Loan Company, with a view to the security of its outstanding debts, and to enable the Bank, in the mean time, to liquidate its engagements without inconvenience to the public." No word of Hughes and Hosking here, except in so far as they are included in these words—"With reference to the communications we have had;" and Mr. Hart has told us what they were: "I am desired by the directors to acknowledge and thank you for your tender of assistance, and to accept of the advance by the Bank of Australasia of a sum not exceeding £150,000 in such sums as may from time to time be required, on the security of the acceptances of this Bank at three months' date, at an interest of ten per cent. per annum, and subject to the following conditions;" so that the loan was subject to these conditions; and if the conditions on which the advance is made are illegal, and the contract must be taken altogether, then the directors had no power to enter into it, and the whole foundation of our responsibility fails. It was then agreed that the Bank should cease. We shall see what was done upon that. In despite of the proprietors it was agreed that "on or before the 31st March next, the Bank shall cease to be a bank of issue, and in winding up its affairs all future payments shall be made through the Bank of Australasia." Now they covenant that it shall cease to be a bank of issue, and you have it in evidence that immediately all the requisite steps were taken to put an end to the business as a bank. No doubt a notice was put in the papers to call the proprietors together, and they were called together; but did the proprietors agree to a dissolution? No, they did not do anything of the kind. They did, however, what they were not authorised to do; they appointed a committee to wind up the affairs of the company. Now there is a clause in the deed to which my learned friend referred, and I thought at first he was going to say, that it was under that clause the committee was appointed; but he went on to argue, that it was an appointment by analogy. The whole of the powers given in this deed are delegated, and the principal that gives them is, the 200 proprietors speaking by their signature to this deed. The directors can do nothing by analogy, and the power given to appoint a committee is, that at the half-yearly meeting the proprietors can, if they are dissatisfied with the accounts, appoint a committee to examine them, and no doubt a committee of proprietors would be the agents of the company for that purpose; but there is no power given to appoint a committee for such a purpose as that referred to by my learned friend, and therefore I do not think that anything done by that committee would have had any authority. However, it is not shown that anything was done by that committee. If it should be contended, that the appointment of this committee to wind up the affairs was *ipso facto* to be considered a dissolution of the company, and that that act was done by the proprietors, then I shall have to urge that point against my learned friend in a subsequent part of the argument. Because you will bear in mind that if at all, the company was dissolved on the 15th March, which will have a great effect upon the supposed acts of ratification of the dissolved body. I am now, however, merely saying that the company had no power to appoint a committee to wind up the affairs.

The Solicitor-General: They only reported.

Mr. Windeyer: You have not shown what they reported, perhaps it was that the proprietors would not do anything of the kind. Therefore, even my learned friend's "appointment by analogy" fails of any effect. However, this does stand clearly proved that although without the sanction in so many words of the meeting of proprietors, the directors did unlawfully, and improperly in breach of their duty, and against their authority, not only bargain that they would crush and extinguish the Bank, but they did all that in them lay to do it; their authority was to manage the £200,000 capital of the Bank, and not to annihilate it, but here they covenant that "on or before the 31st of March next the Bank should cease to be a bank of issue." There is a minute that the pre-directors would call a special general meeting of the proprietors to consider the matter, and I do not see whether that lawful act was or was not done; but at all events, they had no authority to do as they do here covenant and agree that the Bank shall cease. We find afterwards that they did all that they agreed to do; that all the machinery was broken up, and that the tellers and clerks were dismissed. Mr. Falconer also speaks of "the time the Bank stopped," "the time the Bank failed." He did not state the time, but he led us back to the month of March. He knew well enough that one object of the Bank of Australasia was to buy our destruction, who can doubt that besides all the many objects I have stated, Mr. Hurt had in view for the benefit of the proprietors of his Bank, he did gain the direct advantage of extinguishing a revival? Who can doubt where the greater part of our deposit accounts went to? Who had the benefit of that? Who can doubt that both the English Banks would be glad to see the whole of the colonial Banks crushed, in order that they might obtain the entire control of the monetary affairs of the colony? Who can doubt it? Had they not enough already? Was it for our directors to destroy part of the competition by which the public was protected? If we look to these words "for the benefit of the public" that are in our deed, we must suppose that the benefit was to accrue by keeping the Bank open. But as far as we the proprietary were concerned, the directors were appointed to manage the £200,000 for our profit; if it was to be managed for our profit, how were we to gain by the Bank being extinguished? Can you dream that is for our interest, for our benefit, that the very concern we met to carry on, that the very object we have met together to effect, should be destroyed? It is impossible! And you will find that the view of common sense is the view laid down by the authorities; that it is impossible any body of directors whatever can be supposed to have power to extinguish the body that creates them. It is ridiculous to suppose that the creature could destroy its creator. It is absurd. No person entering upon this contract *could* have supposed, Mr. Hart could not have dreamed, that they had authority to make this covenant. He must have been content to take advantage of their violation of duty to gain the contingent benefit of holding over them the threat of these enormous law proceedings to prevent them from resisting his demand, and to induce them to compromise the matter, whatever he got of the proprietors of the Bank, either individually or collectively, he must have considered as so much to the gain. He knew that he would be no money out of pocket by making this loan, that it would come back to him, that it would support his customers, and tend to the maintenance of the credit of the colony, and that it would go towards the payment of the mass of bills in his hands which must have been dishonoured, if this concern of Hughes and Hosking, and all the trade of their connexion had not been upheld. But this was not enough for Mr. Hart, and it is impossible for any man to say that the directors possessed the power to covenant—"That this Bank shall cease to be a bank of issue, and in winding up its affairs all future payments shall be made through the Bank of Australasia." He must have the whole of our business carried on by the Bank of Australasia, and further, make us discounters in this one transaction to an extent that would yield him a profit of from £20,000 to £30,000 per annum. Another condition which it was beyond the power of the directors to agree to—that no bills should be discounted after that date, except such as were required for renewals. So that although the directors were appointed for the purpose of taking deposits and discounting bills, that object was entirely defeated. Although Messrs. Hughes and Hosking's property was not immediately convertible, that and the other securities were still held by the Bank; and the public being aware of that, the Bank might still have been carried on, though not to the full extent perhaps of its previous operations. But Mr. Hart expressly bargains that they shall not discount another bill, although that was the very object for which the directors were appointed, and by that means get our notes into circulation, if the people chose to take them. The public might say "it is very true the Bank have not got cash to pay their notes now, but we need not be in a hurry to present them, they will all be paid in due time." In point of fact the idea of a run for notes upon a joint stock bank, can hardly be entertained. Even in the greatest panic, joint stock banks were not run upon for the payment of their notes. Every individual proprietor might but for a special Act of Council be sued separately for cash for their notes. There is no doubt about the liability of the 170 proprietors to the amount of all their property, upon these notes, and the public might therefore have gone on discounting at the Bank of Australia I know, for my own part, I should have been willing to do so if the Bank would have been good enough to let me have £2000 or £3000; and I dare say I should have found plenty of people who would have been ready to take the notes. But to prevent the possibility of our keeping afloat, as if the first clause of this contract was not enough, they follow it up by saying we shall discount no bills whatever, except notes required to renew bills in this Bank. Again by the third clause, it is agreed that no transfer of shares shall be made without the consent of the Bank of Australasia. They knew very well that this was a joint stock company, governed by a chairman and board of directors, under a deed of settlement, and had actually got a copy of that deed. Now there is a clause here which is as express as a clause can be.

XVII. That every member of the said company, his or her executors, administrators, and assigns, shall, at all times, have, possess, and enjoy, a several and distinct right, title, and interest of, in, and to, his and her part and share, or parts and shares respectively, of and in the capital stock thereof, and the produce, interest, and increase ensuing therefrom, to and for his and her own proper and individual use and benefit, so and in such manner as that the same share or shares, and every of them, shall and may be assignable and transferable by him and her, during his and her lifetime or respective lives, under the restrictions and in the manner hereinafter expressed, and shall and may, on his or her decease or respective deceases, belong and go to his and her respective executors, administrators, legatees, or next of kin.

Here is an express power given to the shareholders to transfer their shares without the control of the directors. The only limits put on the power of assignment and those "hereinafter expressed," are that persons shall not transfer till they have paid up their calls—that they shall not transfer to minors or married women, and that when transfers are made the retirement of parties shall be announced in the public papers. Subject to these limitations every shareholder has the power, in spite of the directors, of transferring his shares. This power is of great importance; and in order to show you the nature of the outrage that has been here committed, I will direct your attention to the deed which gives the power of management to the directors. The deed provides that two directors only shall go out in rotation, and then it provides that there shall be general meetings of the proprietors at which other directors shall be elected. But the meetings of proprietors are limited in their power, they have not the power of displacing directors, so that if eleven directors should come into the control and management of the company, and managed it in a way repugnant to the rest of the shareholders, they would have no means of getting rid of them in any other way than by the ordinary rotation, two by two per annum. And it might happen that a far-seeing shareholder might fancy that the course pursued by the directors, although they might go on in that way for some time, although they might fulfil their engagements honestly, and even fulfil the engagements they were about to enter upon, and which he might disapprove, would open the door to other engagements which would lead to the ruin of the Bank, and to such a proprietor was given the power of saying, "I will get out of this. Besides, those who dealt with the Bank should look to its capital, or even if they looked to those who were to be liable at the particular time the transaction was entered upon, they should have remembered that it did not follow the same body would be connected with the Bank at a future period. The Bank of Australasia said, when they came to our Bank, that the proprietors reserved the power of retiring, and if the Bank should be required to pay this bill, it might happen that instead of the 170 good men that were connected with the Bank, the proprietors would be 170 beggars. Those were the only terms on which they could deal with the directors; but because the powers of the directors were so limited, Mr. Hart could not say, "That is an impediment to the negotiation, and you shall enter into a contract enlargiag those powers." They had the capacity to do so, and could not force the company to abide by conditions that the company did not agree to in the original authority. If the whole body of proprietors are to be drawn into a court of law on this contract, it must be shown that they have consented, that all have consented to it. They have now brought us all into the court, but have we all consented? Had we not provided means by which to avoid the consequences of any improper act of our agents? No doubt that clause was intended to be a caution to those who dealt with us; but they, in defiance of this express power, enter into this contract. And the power which was pretended to be given by that contract has been exercised in the case of an individual to whom no lawful objection could be made. It is not a covenant that transfers only shall be made in the terms of the deed, and it is a covenant that *no* tranfers shall be made, and it appears that they did actually prevent the transfer of some of these shares, and thus accomplish the object of Mr. Hart. I quite admit that it was a provision necessary to the security of the lender; but we never meant the lender to be secure, we never meant to borrow at all. We meant, if parties would come to our directors to lend, that they should see that they were limited in their authority. My learned friend told you that that was necessary for Mr. Hart's security; but what is that but admitting that the contract is null, and one which neither party could enter into—such a contract at all events as we could not be bound by. Then comes the fourth stipulation which my learned friend gently put forward, as one he thought it was possible a great many observations might be made upon it. But as for the rest he did not expect that any observations could be made upon them. It was so much a matter of course that the directors should shut up the Bank, it was so much the habit to do so that really he did not think any remarks could be made upon it. Why, gentlemen, this is almost as good as my learned friend Mr. Foster's story, that it was so much the custom on Hounslow Heath for people to be robbed, that it was said nobody ought to complain of it. In the same way, I suppose it will be contended that it is so usual for the directors to pocket our money and to go against our wishes, that we have no right to complain of their setting aside the deed and putting an end to our Bank. But this is a covenant which he did admit we might have something to say upon, and it is this, "That the liabilities incurred by this Bank for Messrs. Hughes and Hosking, and for Mr. J. T. Hughes, be covered by the execution by them of such trusts to the Bank of Australia, as may be necessary to place the control of the affairs of the firm and of Mr. J. T. Hughes, under this Bank, to meet their existing obligations, and to prevent them from contracting new ones without the consent of this Bank, and that the whole of their future business during the continuance of the trust be transacted through the Bank of Australasia." Here is the profitable part of it, that the Bank of Australia shall be at the trouble of paying the interest and winding up the affairs of Hughes and Hosking, intermeddling with affairs that they had no business with, all that was to be ours, but we were not to be a Bank any longer—we were not to have the profit. This is a matter upon which there may be a little comment. Now it is plain, that even if we had been going to carry on the Bank, that we could not by the acts of these agents of ours be involved in the winding up of the affairs of such a concern as Hughes and Hosking. It is plainly a departure from our business. Where is the understanding? Where is the clause in our deed under which we were to incorporate the individual affairs of Hughes and Hosking with our own? No wonder my learned friend said this was a matter which might be commented upon; I will not, however, tire you by dwelling upon what must be so obvious to common sense, but come to what my learned friend gives as his excuse. He says this stipulation is of no consequence, because it was not carried out; it was not cited upon, and therefore it was of no consequence. His Honor will tell you that a contract is not to be construed by what afterwards takes place, that contracts must be construed by the position of the parties at the time they form them, not by any after accident—it is an after accident, if the fact be as my learned friend states, that the directors did not do what is here provided But I am not quite clear that my learned friend is correct, and it is evident that if he depended upon that fact for getting rid of this condition, he ought to have proved it to you. Has he proved it to you? On the contrary, I think we have some traces in different parts of the accounts, the reports and minutes here amassed together, that our directors did take up the affairs of Hughes and Hosking, that they did do all that they stipulated. At all events, if my learned friend relied upon its not being done, he ought to have shown it—it is not for me to show whether the stipulation was carried into effect or not—it is nothing to us. We merely say, that they had no power to make this loan, that the directors had no power to make this contract, and therefore they could not bind us. That is our defence, and I do not see how it is touched by my learned friend's observation, even if he proved that it had not been acted upon, although I think you will find that it was. Therefore this clause stands in the same position as the rest of the clauses by which the object we had in view in entering this association, is entirely defeated. Then comes the fifth clause, which certainly is very compendious—it merely says in fewer words what it said before, that the Bank of Australia shall not incur any new liabilities without the consent of the Bank of Australasia. So that the contract comes to this, that those who acted as our agents by this deed became the mere tools, the agents, or to use my learned friend's word, the "cat's-paw" of the Bank of Australasia. We are to be their tools, their agents, and those who were appointed to conduct our business are, in order to get out of some trouble which they got into by appropriating our money to their own purposes, to be enabled to injure us still farther by a still greater departure from their trust, by selling our business to a rival establishment. The idea that these things were in the power of the directors is really monstrous, and that such a case can be brought into a court of law, only shows the reliance that must be placed on what is called "the glorious uncertainty of the law." But on behalf of the practitioners of the law I repudiate the application of that term to our profession. If the law were as uncertain as the saying pretends, it would cease to be a science. It is not in the law as it is laid down, that the uncertainty exist; the "glorious uncertainty" is in the juries—it is the jury that my learned friend hopes to catch. He relies upon you being led away from the law by some fanciful notions of equity, that your feelings of the fear of responsibility will be worked—upon the fear of the disgrace which he tells you will fall upon those who violate their duty. I do trust the expectation of my learned friend will be disappointed—that you will look to this contract, and without any fear of the results, the imputations that may be cast upon you, or that he may endeavour to make you believe will be cast upon you, that you will see you have justice and law upon your side in returning a verdict for the defendant—that he will be disappointed in the expectation of being able to fasten upon a Jury the result of making the law uncertain. I have now gone through this contract; we have already seen some of the principles by which it must be construed—by which the power generally, of these companies, must be construed, and which you must apply in your consideration of this contract. I will next take the liberty, in order to bear out my words, that you may be satisfied I lay down no law that is not found in the highest authorities, of bringing before you the cases that support my positions. They will not be many, but of the very greatest value and importance.

The Court adjourned for half an hour.

His Honor having resumed his seat,

Mr. Windeyer was about to proceed.

His Honor said, that it was his intention, in order to suit the convenience of the bar, one of whom, Mr. Foster, had just spoken to him on the subject, to adjourn, if Mr. Windeyer finished to-day, until Tuesday, when he would deliver the charge to the jury, which would be in writing.

The Solicitor-General said, that he intended to urge on the Court his right to reply. He had been informed by a member of the bar, who had recently arrived from England, that the reply was granted in such cases; and he had been informed by his learned friend, Mr. Foster, who was with him, that the right of reply had been conceded to and exercised by him.

Mr. Windeyer said, that he was not aware of any authority that his friend could quote for what he now claimed—he was not aware of any stranger being present, except a barrister from Port Phillip, and the practice of Port Phillip could not bind this Court. With respect to his learned friend, Mr. Foster, he would only say, that within the last two years, at all events, no such right of reply had been conceded or exercised.

The Solicitor-General contended at some length that he was entitled to reply to the arguments of the counsel on the other side as to the law of the case, however he might be precluded from entering into evidence to contradict their statements of facts.

His Honor decided that the Solicitor-General had no right of reply.

[The arguments on either side were taken *nunc pro tunc.*]

Mr. Windeyer resumed: May it please your Honor, gentlemen of the Jury,—It has been very broadly laid down that, although it may be possible for a counsel to sustain himself during an address to a Jury of some eight or nine hours' duration, there never was any Jury who had the power of bearing the infliction, and however willing they might be, it was impossible, from the constitution of the human mind, that they could keep their attention fixed for so great a length of time upon matters that they had no direct personal interest in. This observation was called forth by the late Lord Chancellor Eldon, in the celebrated speech of his that lasted eight or nine hours, in the prosecution of Hardy and his companions for treason. Without saying that it is not difficult to fix the attention for so long a period in matters that you are not interested in, I think I may congratulate myself in having a Jury that has been good enough to pay as much attention to the case as to render it unnecessary for me to resort to any of the ordinary resources of an oral address, which generally involves the necessity of repetition in different shapes of the same argument, in order that if it do not strike the mind on one occasion, either from absence of thought in any of the parties, or from any other cause, it may in

another. But it is in the faith that you will follow me throughout that I shall go straight on to the end of my work, and enable you to get away as soon as possible. I was about to bring some authorities in support of the several new positions laid down before the Court adjourned. I do not, as just insinuated by my learned friend, nominally bring these authorities before you, but really address myself to His Honor. I presume, I am bound to presume, and I know as a fact, that His Honor is already acquainted with these authorities; but in your case, it is not so. You are not of necessity to know these matters of law in their full detail, and it is right in me to bring these matters before you, because, as you have heard His Honor say, that in the matters of fact that come within your jurisdiction you have complete control, and in as far as the issues of law are involved in those facts you have also control, taking from His Honor the law so far as belongs to His Honor to interpret it. I was about to bring before you the authorities for several of the later positions I have laid down; and in order to save you time, I will chiefly do so in the condensed form in which they are laid down in the law practices. I will first refer you to Story on Agency, (and I am afraid you think the longest story you ever heard,) page 18 and 19: "It is very certain that the law will not from any general expressions, however broad, infer the existence of any such unusual agency, but it will rather construe them as restrained to the principal business of the party in respect to which it is presumed his intention to delegate the authority was principally directed. Thus, for example, if a merchant about to go abroad for temporary purposes should delegate to an agent his full and entire authority to sell any of his personal property, or to buy any property for him, or on his account, or to make any contracts, or to do any other acts whatsoever which he could if personally present; this general language would be construed to apply only to buying or selling connected with his ordinary business as a merchant, and would not, at least without some more specific designation, be construed to apply to a sale of his household furniture, or library, or the common utensils, provisions, and other necessaries used in his family. Much less would it be construed to authorise any contracts to be made which would be of an extraordinary or personal character, such as a contract of marriage, or of marriage settlement, or a sale of such things as would break up and destroy his business as a merchant in his particular trade." If anything can be said to have been written almost expressly to meet the first condition of this contract, that passage is; but in point of fact we hardly want authorities for it; it is the rule of common sense. Further, upon that as the general rule, I will bring before you a very striking passage from the 4th volume of Mr. Pardessus's Law of Commerce, page 90. He is treating of the administration of joint-stock companies:—

It is important to ascertain (for it ought always to be the basis of decisions, whenever a doubt is raised of the legitimacy of the act of a director, both with regard to third parties, and the partners themselves) whether what he has done be a matter of *management*. Thus, in a manufactory, the director by virtue of his office, may buy the goods and subscribe the obligations to pay their price, or even money borrowed for the purpose. He may sell the manufactured articles, because that is what they are destined to, and even the raw materials which the partnership may have bought to manufacture, because the hope of making a profit by such results may, in certain cases, have been contemplated. * * * * * But any alienation he might make, without a special authority from his co-partners of the house or buildings belonging to the manufactory or business of the partnership, would be evidently nul, even with regard to buyers, who *ought never to have thought that the powers of a director could be extended so far as to enable him to sell the plant of the establishment.*

So here is the general principle laid down, that even the party dealt with "ought never to have thought that the powers of a director could be extended so far as to enable him to part with the very thing that he is appointed to manage. Now this was not an act for the conduct of the business of the partnership, it was an act that put an end to it; an act which no buyer, no person dealing with the directors could think there was a power to do. I will now produce an authority that I have referred to once or twice, and which does to some extent appear to shake what one's primary notions of justice are. I will admit that it makes a strong *primâ facie* case against us to-day, "You have had the money, you had it in the time of your necessit;y" but if you look narrowly into it, you find that our having had the money has nothing to do with the question; and this is founded in reason and justice, because who would be safe if the authority given to a servant was to depend not upon the circumstances under which you give it, but upon circumstances which turned up afterwards—it would, in fact, be exposing your transactions to the dominion of chance. Therefore, however hard it may be in a particular case, what we contend for is a necessary and equitable rule. We say our agents had no authority to act as they have done, and we are bound to resist such a power from the beginning, and we would resist it if the sum in dispute were only a £1000, not merely for our own sakes, (and the law would not decide merely for our own sakes, the law would not fix such rules for our sakes), but for the safety of all similar institutions. In order that joint-stock companies may be carried on, it is necessary there should be such a rule. I will now cite the case of Hawtayne *v.* Bourne: "This was an action on an account stated, the defendant, who resides at Liverpool, was the holder of 100 shares in a company established for the working of a mine called the Trewolvas Mine, in the parish of St. Columb Major, Cornwall. The mine was managed by an agent appointed by the directors of the company for that purpose. In March, 1839, in consequence of the shareholders not having paid up the calls regularly, the concern fell into difficulties, and the agent from want of funds became unable to pay the labourers, a considerable number of whom, their wages being in arrear, applied to the magistrates and obtained warrants of distress upon the materials belonging to the mine." We have never come to that point; the argument is, that we were threatened with so many actions, but here the warrants were issued: "the agent finding that these warrants were about to be put into execution applied in the name of the company, but in fact upon his own responsibility, and without the knowledge of the shareholders to the St. Columb Branch of the Western District Banking Company, for a loan of £400 for three months, which was advanced accordingly, and placed by the Bank to the credit of the Company, and out of it the arrears of wages were discharged. To recover the balance of that sum the present action was brought. There was some evidence of a conversation between the defendant and the agent, in which the former had asked whether they could not get money from the Bank to keep the concern going; but this evidence was not left to the Jury. The learned Judge in summing up, stated to the Jury that although under ordinary circumstances, an agent could not, without express authority, borrow money in the name of his principal so as to bind him; yet, if it became absolutely necessary to raise money in order to preserve the property of the principal, the law would imply an authority in the agent to do so to the extent of that necessity; and he left it to the Jury to say whether the pressure on the concern was such as to render the advance of this money a case of necessity." Upon that direction the Jury found for the plaintiff. That is the principle which my learned friend has to contend for and to rely upon. So far he appears to have authority on his side; but, gentlemen, it was afterwards in full Court decided that this single Judge, sitting at *Nisi Prius*, was mistaken; "accordingly the matter came on for argument," and I need not go into the argument further than to say that it was in principle very much the same argument that has been addressed to you. The result was that the full Court decided that that was not the case, and this is what was laid down: Parke, B., in delivering the judgment of the Court, says—"This is an action brought by the plaintiffs, who are bankers, to recover from the defendant as one of the proprietors of the Trewolvas Mine, a mine carried on in the ordinary way, the balance of a sum of £400 advanced by them to the agent appointed by the company of proprietors for the management of the mine. Now, the extent of the authority conferred upon the agent by his appointment, was this only—that he should conduct and carry on the affairs of the mine in the usual manner; there is no proof of express authority to borrow money from bankers for that purpose, or that it was necessary in the ordinary course of the undertaking, and certainly no such authority could be assumed. There are two grounds on which it is said the defendant may be made responsible—first, on that of a special authority given to the agent to borrow money; and, secondly, on the assumed principle that every owner who appoints an agent for the management of his property, must be taken to have given him authority to borrow money in cases of absolute necessity. There certainly was in the present case some evidence from which a jury might have inferred that a power to borrow for the purposes of the mine had been expressly given to the agent; but that evidence does not appear to have been left to the Jury, and therefore the verdict cannot be supported on the first ground. Then as to the second ground, it appears that the learned Judge told the Jury that they might infer an authority in the agent not only to conduct the general business of the mine, but also in cases of necessity to raise money for that purpose. I am not aware that any authority is to be found in our law to support this proposition. No such power exists except in the cases alluded to in the argument, of the master of a ship and of the acceptor of a Bill of Exchange for the honour of the drawer. The latter derives its existence from the law of merchants; and in the former case the law which generally provides for ordinary events and not for cases which are of rare occurrence, considers how likely and frequent are accidents at sea, when it may be necessary, in order to have the vessel repaired, or to provide the means of continuing the voyage, to pledge the credit of her owners; and therefore it is that the law invests the master with power to raise money, and by an instrument of hypothecation to pledge the ship itself, if necessary. If that case be analogous to this, it follows that the agent had power, not only to borrow money, but in the event of security being required, to mortgage the mine itself. The authority of the master of a ship rests upon the peculiar character of his office, and affords no analogy to the case of an ordinary agent. I am therefore of opinion that the agent of the mine had not the authority contended for. Whether he had or had not was a question for the jury; but on the general principles of law, it seems to me that the ruling of the learned Judge cannot be supported, and therefore that the rule for a new trial must be made absolute. Alderson, B., "I am of the same opinion. There is no rule of law that an agent may in a case of emergency suddenly arising raise money, and pledge the credit of his principal," and so forth. You will observe, therefore, that what was dwelt upon by my learned friend so much in his opening, namely, the pressing necessity we were under, has nothing to do with the case; our having had the money, as appears also from the other cases I cited yesterday, has nothing to do with the question; the sole question is, what was the authority given *at the time of the appointment of the agent?* And it is absolutely necessary that you should not be misled—deluded—as the learned Judge who tried the case of Hawtayne *v.* Browne was from want of consideration, and apparent hardship of the plaintiff's position. You will not have his excuse. My learned friend has chosen to bring a desperate case into Court, and to take the chance of your catching at some fanciful equity; but you have been now shown that so to do would be against all the known rules of law by which only our affairs can be governed, and by an appeal to which only they ought to be regulated. The next authority, and it is the last, gentlemen, I shall cite upon this particular point, is one of very great value. It will bring under your notice even the doubtful questions of whether an ordinary partner has power to borrow money at all and will show you how that power, even if it exist, must by the law of common sense be limited. The case to which I am about to refer is in the second volume of Hare's Reports, p. 218, Fisher *v.* Tayler. I will shortly state the facts. There were three partners in a firm, one of whom died, and it became necessary to pay his executors the funds belonging to him that were in the partnership. The two surviving partners agreed to call in a third partner, whose contribution to the funds of the partnership should pay off the executors of the deceased partner. An advertisement was accordingly put into the papers mentioning that object, namely, to raise money for the partnership in that way. A gentleman answered the advertisement, and it came out in the course of conversation that he did not wish to come into the partnership; he agreed, however, with the partner who was appointed to manage this matter, to advance £4000, and to become a clerk in the concern, receiving a salary. Afterwards the partnership became bankrupt, and the gentleman who had advanced the money then sought to recover against the two partners or their representatives the amount of his loan, but the partner who had not conducted the transaction, as my learned friend says, "repudiated" the contract. He said in effect as we say now, "This was no contract of mine; it is very true I authorised my partner to raise the money, but it was in a particular way." This dispute raised the general question in the Court of Equity, and the result was the delivery of the opinion upon the general principle that I am now about to bring before you; and it is for you to say whether I do not stand justified by it in what I have said. I should tell you that the matter was referred to the Master as to whether the lender's (Wilkin's) claim should be allowed, and the Judge says

I have ascertained that the Master has decided against the claim of Wilkin, upon the ground that this could not be considered an ordinary transaction within the scope of the implied authority of a partner, and I have not yet heard anything to satisfy me that it can be so considered. Advances of money to carry on the transactions of an established concern, may be good to bind the firm, though obtained by one partner only; but suppose a concern not established, is there any implied authority in one partner to bind his co-partner by bills or otherwise, to raise capital? Upon principle, I should say clearly not,—otherwise any partner might be made to contribute to the payment of his co-partner's share of the capital to be raised. This view of the subject is supported by the case of 7 B. & C., 635, Greenslade *v.* Dower. Then, if money is wanted by an established firm, not for its ordinary transactions, but for the purpose of paying off an out-going partner, of raising additional capital and carrying out new arrangements, does it necessarily follow, from the ordinary case, that each partner has an authority to make the other liable for money to be raised for such purposes? It is obvious that the money to be raised for such purposes should be contributed by the partners according to the special agreement between them at the time, and not that one partner, —who peradventure, ought to provide the whole fund which the new arrangements may require,—should by accepting bills in the name of the firm have power to throw on his co-partners the burden he ought himself to bear: I cannot but think that money required for extraordinary purposes and new arrangements, not comprehended in the partnership transactions of the old firm, constituting as it were, a graft upon, or an addition, to an established firm, stands, for a purpose like the present, upon the footing of capital to be raised for the establishment of a new concern, and not upon the footing of money raised for the ordinary dealings of an old firm. Difficulty no doubt may exist if a party dealing with one member of an established firm lends money on a supposition that the money was borrowed for ordinary purposes. But here, Wilkin had notice of the purpose for which the money was required, and of the special manner in which it was to be raised; and must not that notice have informed him, that there was a new and special contract between the parties was to regulate the proposed arrangement between them? or, in other words that this was not a case to which the implied authority of a partner to bind his co-partner could extend? This was the view the Master took of the case, and it appears to me to deserve more consideration than it has yet received at the Bar. I have gone into the case not to express any opinion upon it, further than to explain what the point is on which I felt pressed. The parties, if they desire it, may, before I make up my mind on the case, speak to it again on the point I have last adverted to.

Then again—

In point of fact, from the beginning Tayler was exempted from bringing in capital; he was to pay no part of the £8000 nor of the £1500; he was only to bring in a share of the moneyed capital, in case an addition should be found necessary exceeding the £1500 to be brought in by the other partners. The advertisement, which is the act of both the partners, is therefore evidence of an agreement having been come to between Tayler and Shuttleworth, whereby the former agreed that the concern should no longer be carried on with the limited amount of capital, but that the same, as between the partners, should be increased, not by borrowing any money on the credit of Tayler, or by rendering him in any way chargeable for the increase, but by finding some person willing to advance the capital in consideration of a share in the concern. This was the undoubted contract between the partners, and upon that contract the question is, whether Shuttleworth had any authority to go into the market and raise money on the credit of Tayler's name as well as his own. That he possibly might have succeeded in charging Tayler by borrowing money of a person who was ignorant of this special contract,—I do not say to the amount of £16,000, but that he might have charged him for ordinary partnership purposes, may be admitted; but if, having that advertisement in his hand, he goes to a person willing to lend money, and says, "this is my authority to raise capital," can that person lend the money on the credit of Tayler's name, and hold Tayler bound by the amount of that advance? I will suppose the contract between Tayler and Shuttleworth to have been that Shuttleworth should find the whole money, and Tayler should find no part of it. If that appeared on the face of the contract it is impossible that any person lending the money to Shuttleworth for that very purpose could say that Tayler was bound by it; for on the face of the written authority he would in fact have notice that Shuttleworth was exceeding his authority when he made use of Tayler's name as a security for repaying the money. It appears to me that such a case would not be more conclusive than the case which has actually happened. How does Mr. Wilkin represent the case in his own state of facts? he says that he received an answer to his letter from the solicitor of the firm; that the meeting which took place between him, the solicitor, and Shuttleworth, was adjourned without anything having been done; that an adjourned meeting was had, and that it was ultimately arranged that he should make the intended advance as a loan to the firm, and that he should act as accountant, at a salary; that the negotiation was continued and carried on by Shuttleworth, as such partner, on behalf of the firm of D. F. Tayler and Co.; and the object for which the money was intended to be raised was stated by Shuttleworth to be the payment of the estate of a deceased partner, and for other partnership purposes. In point of fact, having met to negotiate for becoming a partner and advancing capital, whereby Tayler could not have been subjected to any charge in respect of the capital so advanced, instead of doing that he declines to become a partner; and then, as he himself says, makes the intended advance as a loan to the firm, and not only receives notes by which the firm was to be bound, but at the same time enters into a very special agreement connected with the security. [His Honor stated the agreement.] It appears, therefore, plainly, that this is not the case of money borrowed merely for the general and current purposes of a firm, in which case no question could have been anticipated, but that it is a large sum of money advanced as part of the permanent capital of the firm, and advanced to a partner who, on meeting Wilkin, gave him notice that he had authority to borrow, *but in a totally different way, and one which would be attended with very different consequences.*

You will now see why it was I so much pressed upon your attention the mode in which the Bank was authorised to raise money, and the fact that the plaintiffs knew of it.

It is not merely a common bill or note given in the ordinary course of business, but it is an advance accompanied by an agreement for the employment of this gentleman by the firm, *with a view to the protection of his own interest,* for giving six months' notice of payment, and *embracing other special terms,* I have not the slightest doubt that in a case of this description, where two partners have agreed to make a permanent addition to their capital, and to make it in a particular mode, that no party can with knowledge of that special agreement, bind the absent party in any way other than that which the special agreement would authorise. Suppose the case of two partners carrying on business with a capital of £2000, each contributing £1000, *the operations of that firm are necessarily carried on to an amount proportion to the employed means,* and each partner is safe so long as the affairs of the concern are well conducted; but if that capital is to be permanently increased, doubled or trebled, or if the operations of the concern are to be so, moneys advanced for that purpose cannot be treated as moneys advanced for the ordinary purposes of the trade; it is, in fact, wholly altering the character of the business.

Gentlemen, I will not insult your common sense by supposing that you cannot see the application of this passage to the case before you—this is a bill given for borrowed money, the case is, in fact, almost on all fours with this, and the general principles laid down illustrate our position in the strongest manner—they would do so even if ours were the common case of an ordinary partnership, but much more forcibly do they so when the vast difference between an ordinary partnership and a joint stock company is considered—even if an express authority were given to borrow money, it must be construed with reference to the fact that we were a joint stock company, with reference to the amount of our capital and the objects for which the Company was instituted—all the objects noticed by the Vice Chancellor—but the case does not stop there, for at page 237, His Honor goes on to say—

There is another view, however, which may be taken of the case. It is true that there was £16,000 to be raised by way of increase of capital, and in order to enlarge the transactions of the firm; but there is no suggestion that the old firm was not to go on in the mean time. On the contrary, the very circumstance that transactions were proposed to be enlarged, shows that the old firm was intended to be carried on until the increase of the capital should be raised; and it is not disputed that such was the intention of the parties. Now, if the old concern was to go on, undoubtedly all the partnership rights of Shuttleworth and all the partnership liabilities of Tayler would remain with respect to that partnership. If it were necessary to borrow money with a view to preserve or carry on the old concern, there was nothing in the circumstance that they proposed to enlarge their partnership transactions, that would necessarily make it illegal in Shuttleworth to borrow money for their general purposes; and I understand Mr. Romilly's argument to be, that inasmuch as it appears the firm was much pressed at this time, and Wartnaby's estate was demanding payment of money, the £4000 was a sum which reasonably might be necessary to carry on and preserve the old firm. There are thus, so to express it, two antagonist principles which might apply. I have the strongest impression that Shuttleworth was not justified in binding the firm in respect of any advance of the £16,000; at the same time, I have nothing to lead me with certainty to the conclusion that he might not be justified in borrowing, or Wilkin in lending, money to some extent, with a view to carry on the old concern.

His Honor puts it that if it can be considered as an advance made, although he does not think it is, for the ordinary purposes of the partnership, then he would give leave to the party applying to go to a jury upon the bill of exchange, to try the question, whether the circumstances of the partnership authorised it, and that would depend upon whether the loan was made for the purpose *of carrying on* the partnership. I am not aware of any report of a case in which Wilkin took advantage of the leave given, but am rather disposed to conjecture from the absence of any such case in the books that he took the Vice Chancellor's hints, that whatever right he might have upon the note, if it were for the ordinary purposes of the business—if the money were applied to the ordinary purposes of the business; it was, in fact, a transaction which destroyed Wilkin's claim. His Honor takes the same view of this transaction that we might take of the present case, if we were driven to argue the question of implied authority, he says, "it is out of the ordinary course of business." This decision refers only to an implied authority; but my learned friend put the present case in the proper point of view, when he said there must be an express authority. He says there is such an express authority, I say there is not. Then we say, where are these words "the directors are authorised to *borrow* money?" if you cannot find them, there is no authority, and to try to screw such a meaning out of the words to which you have been referred would be to give an implied and not an express authority. We are now, gentlemen, in a condition to judge entirely of the plaintiff's case. I think I have shown you upon what principles you will have to decide it, and we have now to look at it altogether. I have disposed of the three first minor matters, and we are now upon the loan, and the note given on account of it. My friends, with regard to the note, and indeed with regard to all parts of the case, have put in a vast mass of evidence, but it may be classified under three heads. There is first of all, putting aside the little notes, an attempt to show an actual authority, then to show that the authority has been pursued, and then there is an attempt to show that the act has been ratified by the principal. With regard to the authority for the loan, I will not trouble you farther. I had intended to come back to it in the usual way, but I think it will be unnecessary, as I am sure you have attended to the argument. With regard to the manner in which the authority was pursued in the concoction of the bill, it is, however, necessary to say a few words more. [The bill was handed by the Clerk of the Court to the learned counsel.] I have never seen it before, gentlemen, but here it is sure enough! A real live promissory note for £154,000! Not a sham note such as you may sometimes see stuck up in a barber's shop, but a real live promissory note for £154,000! Why, gentlemen, I do not know how the words affect you on hearing them, but to speak them almost takes away my breath. The idea of any man in his common senses writing "I promise to pay on demand"—on demand, gentlemen,—"ONE HUNDRED AND FIFTY-FOUR THOUSAND POUNDS." Why, the bare mention of the amount is enough to stagger one! Certainly I never did expect that it would fall to my lot to read a genuine instrument of that kind. I have heard of a gentleman who began life very poor, but having acquired wealth, had a thousand pound note framed and glazed and hung over his mantel-piece, to solace his eyes with; but I think I may be content with having a copy of this framed and glazed, for I certainly never shall see another such—I never expected to see this. However, here it is, and I can hardly believe my eyesight, though I have got it before me. There is no doubt about it. It is made in the proper form; the form, however, "for and on behalf of the Bank of Australia," does not appear to be in Mr. Norton's handwriting. I suppose that is put in by one of the attorneys of the Bank of Australasia. At all events, it is signed by Mr. Norton in the proper form. But there are two things to be established before we can be at all bound by this.—First of all, my learned friends have to show the authority to make the loan for which the note is given; and, second, that the authority was pursued. Now, the authority they say is pursued in this manner: They put in a minute of the board of directors which contains the authority to Mr. Norton to sign bills or notes when required by them on any future occasion; it is, in point of fact, the very same authority that was given to Mr. Macarthur, and I believe all the authorities were in the same terms, although followed in a different manner. The authority is, that they may or shall sign any notes, &c., when requested, or when required by the board of directors. That is the minute. Now I do not find that my learned friends have proved what might have been so easily proved, when our directors were in the box, if it had been done. They never asked any of our shareholders who were examined, "Were you ever present at any board at which Mr. Norton was requested to sign this." They had Mr. Macarthur in the box, who has never ceased to be a director; but they never proved any requisition from the directors to sign that note, and Mr. Norton had no authority to sign it, unless he was so called upon by the directors. That authority is to be as strictly construed as any in the deed. The directors are authorised to direct persons to sign notes, and no doubt in order to save the necessity of going through that regular form every time they pass a general minute to say, Mr. Norton is to sign whenever they required him to do so, but he has no authority to sign unless they do require him. The case of the chairman of a bank is not like the case of a Government officer: any public officer, as a sheriff, or a magistrate, who acts within the scope of his authority is presumed to do so properly, and his acts are supposed *primâ facie* to be legally done, but that is not the case of the chairman of a bank. There is no presumption that Mr. Norton would not sign a note unless he was required to do so. And therefore my learned friends have failed to supply the last link of the chain which was to show that the authority was given to Mr. Norton to sign his name to this bill. There is not a tittle of evidence to show that the board of directors ever required Mr. Norton to put his name to this bill. It will be for you to say whether there is in all the minutes of the Board of Directors that have been read, any requisition, any note, any record, any memorandum of this note before the Board of Directors, and of the Board requiring Mr. Norton to sign it. They (the other side) might have had the minute book, we offered it to them over and over again, if there was any thing in it that could have helped them. It is not for me to make out that there was not an authority, but it is for them to show that there was; therefore upon that ground they would have to fail—upon the technical point, even if they were not to fail upon the larger grounds I have put before you. I presume it was under the 55th clause, that the Solicitor-General wanted to make out that the directors had power to settle and determine the form and nature of the securities and cash notes to be given and taken. I will admit that it is so; but what we deny is, that it is such a security as is meant in the authority to the directors. What are meant there are securities that relate to and concern the particular authorities already given, but the words are not meant to apply to every liability that may be contracted by the directors. All the large words are to be cut down and limited to the particular object of the Bank. It shocks common sense to suppose that such a note as this was ever contemplated by the Bank. It is the form in which the loan ultimately became consolidated, and it is null and void as against us, because we say whether you look at it as regards the form as signed by Norton, without authority, or whether you look at it as regards its origin, it is not our note. That is what my learned friends have to make out. This is not the ordinary case of a promissory note, given by one private individual to another; in that case all the plaintiff has to do is to produce the note and to prove the signature; and it is then thrown upon the defendant to plead want of consideration, or any other matter that may affect the plaintiff's claim. That is not the case here, because the note is made "for and on behalf of the Bank of Australia," therefore my learned friends has to prove two things, first, that the note was made by James Norton, which I admit they have done; and next, which we say they have not done—that it was made by the authority of the Bank of Australia, or even by authority of the directors. I contend that it stands upon the evidence that they had not the authority of the proprietors or of the directors, and for want of that last link the whole case on the note fails. The necessity of showing a chain of agency, of evidence, is manifest, and my learned friends see it, if Mr. Hart did not. The whole body of proprietors committed the conduct of their business to their agents, and it is the acts of those agents within their authority that is to bind the proprietors. The last seven days have been occupied in an attempt to prove, not Mr. Norton's handwriting, but Mr. Norton's authority, and the authority of the directors. My learned friends felt that the burden was upon them to prove the authority, and I submit that they have failed to establish it—that they have utterly failed. I presume that my learned friend thought it possible I should so contend: indeed he said that was what I should contend, and I dare say he thought you would conclude that that would be as easy to make out, as it was, from the distinction of the accounts, to show, that the money had not remained with us, and therefore at last he said it was a nice point. I do not admit, I am not bound to admit that it is a nice point, but it is plain I think that he would not in a case of this kind have engaged in any work of supererogation if it was quite clear that there was authority. My learned friend is however satisfied that any want of authority is made up by the ratification of the shareholders. Now I will begin by admitting the point of law, almost the only point of law that my learned friend ventured to lay down, that a subsequent assent is as good as a previous authority It is so. I will admit even that cases have gone farther, and have decided that a subsequent assent is better than a previous authority, and I will give you the reason—If I tell my servant to do a thing and he does it, it still lies doubtful whether he has done it as I wanted it; but if after it is done I express my approval, if I adopt it, there is no longer any doubt it is my very act. My learned friend throws himself upon that point of law, and endeavours to show you that he has got such approval. Before I go into the question of whether he has shown any ratification, I will beg your attention to what is required, in order to make a ratification. The act of an agent must be ratified by his principal, and in the case of one principal there is no difficulty in showing by his language and conduct the ratification. But who is the principal here? The 170 persons who have signed the deed, which is the power of attorney to the directors. Therefore in order to prove a ratification of the acts of the agents, it must be shown that there is a ratification by the 170 proprietors. Well then, it being impossible from the nature of joint-stock companies, to show a ratification by the separate acts and sayings of the individual members, they were obliged to have recourse to the only joint act that the 170 members of the company have ever engaged in—the only joint act they have ever engaged in is this deed of settlement. So we again come back to it even on the question of ratification. Well, what does this deed of settlement say? It gives the management of the company to the directors. Now the management cannot be in two parties, it must be in one. There is not even so much management in the body of proprietors, that they can put out a director except in the mode pointed out in the deed. The general meetings are constituted in that deed—the power of general meetings is created in that deed—and in that deed from the beginning to the end of it there is no single sentence that gives the full power of the whole 170 to the general meetings. The 170 signing that deed have never committed so mad an act as to say they give the whole authority they had to this deputed body. There is no doubt that in works on agency there is a bare possibility put that potentially speaking there may be such an agency, being given by one individual to another, but no one ever saw it in existence. But who ever dreamed of such a thing as 170 persons committing the whole of the powers they could not exercise to any smaller number. Because, although I may agree to all the matters in the deed, yet if I have occasion to go into the country or to return home, I do not wish to leave a further control in the hands of persons in whom I have no trust, in whom the law does not presume mutual confidence. I am willing to give them a limited power, but I am not willing to give them power to do all I could do. What do the 170 shareholders therefore? They constitute directors to manage the concerns generally, and they constitute meetings of proprietors to have certain powers, but not all powers. In effect the deed creates two species of agency for the 170, the agency of the directors and the agency of the meetings of proprietors—each have limited powers: neither have plenary powers. What follows? The confirmation of the general meetings is the confirmation of the wrong act of one agent by the wrong act of another. If one agent had no authority to act as he did, how is it possible that another agent with no greater authority could ratify the act? The thing is absurd, and it appears to me that in point of fact, my learned friends forlorn hope is more hopeless than his principal case—I entreat you to look to this deed, to look through it, to see not only what the directors' powers are, but what are the powers of general meetings. The expression of one power excludes the supposition of there being any other, and we can see by looking to the deed, what are the powers given to the general meetings. The clauses that relate to these powers are various, and so far from giving to the meetings of the proprietary the power to ratify an illegal act by which the proprietary could not be bound, it is especially provided that, in order to do certain things out of the usual course, there must be at the meeting, a majority of the proprietors for the time being—now, we have it in evidence, that never at any time have there been a majority of the proprietors for the time being present. It is true that when I called the attention of my learned friends to the matter, in the cross-examination of a witness, it was attempted in the re-examination to suggest the possibility that some of the parties present had proxies in their pockets. Then my learned friend should have shown the existence of these proxies, because there is a clause in the deed to show the particular form of the proxies, and it is not because it is barely possible there might have been proxies present, that there were of necessity enough present to make up a majority of the proprietors. It was for them to show if they relied upon that or any other clause of the deed that gave to the general meeting the full powers of the whole body of the proprietors, that there was a proper number of them present. This matter, if it amount to anything, amounts to an alteration of the fundamental regulations of the society. The fundamental regulations were framed for the carrying on the business of the society, with a certain capital, and this transaction amounted to borrowing money to increase and alter the business of the company, and virtually to extend the capital. In order to accomplish that, to set aside any one rule or regulation, it was required that there should be at the meeting a majority of the proprietors. The 72nd clause is as follows:—

LXXII. That at any General Meeting regularly convened as aforesaid, *at which a majority of the whole number of the Members of the said Company shall be present,* or shall be duly represented by proxy, any or either of the covenants, provisos, clauses or agreements, in these presents contained, and all, or any, or either of the rules, orders, and regulations, made or adopted by the said Company, may be altered, varied, revoked, or annulled, and after any such variation, alteration, revocation, or annulling shall have been made, then and from thenceforth the several members of the said Company shall be absolved and freed from all such former, original, or previously subsisting covenants, clauses, provisoes, agreements, rules, orders, and regulations, so far as the same shall be so altered, varied, revoked, or annulled, and shall be bound only by the new or altered covenants, clauses, provisoes, rules, agreements, regulations, and orders, which shall have been substituted in the room thereof.

Very well, but it was for them to show it, and they have not shown that there was a majority present at that meeting, or that they were duly represented by proxies. They tried to do so, and failed; and therefore, the very ground on which my learned friend mainly depended in his opening, and which he expected to prove, he has failed to prove. They thus failed in the very first step they took, with respect to this ratification. They merely showed that there is a species of agency of a very particular description which might have the power of doing what they wish to do; for I do admit that if a sufficient number of the proprietors had met, they might have altered the fundamental principles of the company, so to have brought this act within its scope; but that has not been done, and therefore the ratification falls to ground as much as the original act. In the mass of evidence before you, there are two species of ratification alluded to, that of the proprietors, and that of the directors, but of course it stands to common sense, that if the directors had not the power to do the original act, they had the power to confirm it, and therefore the heap of evidence that has been given on that point falls to the ground. But I should like to know, supposing the meeting of the proprietors had the power, where is the confirmation, where is the ratification. I have always understood that when a principal ratified an act it was requisite in the first instance that he should know what his agent had done; that it should be clearly shown that he was made acquainted with it in all its parts. Upon none of these reports that that this bargain was brought before the proprietors. What was brought before the proprietors was this, a statement of accounts in which the directors show they have committed the wrong act. It stated vaguely and generally that the bank was under liabilities to the Bank of Australasia, and then the meeting of proprietors are said to have adopted the report; but my learned friend failed to prove that. He called Mr. Larnach, who I suppose was to have moved or seconded the resolution for the adoption of the report; but so far was he from recollecting any act of ratification, that he could not recollect anything about the matter. I will admit that my learned friend put in a printed paper, in which it is stated to have been done; but he is to make out the authority strictly—he is to show, not only that it is stated in the printed papers, but who it was that drew it up. For this purpose he called Mr. Larnach; but he merely showed that some report had been drawn up by somebody and sent to the printer. But taking it, for the purpose of argument, that is before you, what does it amount to? Does it say "Here is an illegal act committed by the directors, and we, the body of proprietors hereby ratify it." Is there more in it than this, that the directors make a report of the fact, and that upon the report being adopted, the proprietors acknowledge that the fact is so. They may approve of the report, but be very sorry for the act,—an act which they had before resolved never should be done. The ratification must be done with the mind, with the intention of being bound by the thing done. No man can be entrapped into a ratification. If your servant had committed a fault, and I came to you to obtain your forgiveness for him, mentioning only a part of the fault, you would not be bound by a promise to forgive him, because you had promised, not knowing the whole part. But there is another difficulty in my friend's way. If it were possible to suppose that the whole body of proprietors, the whole 170, had said, "We will pay this debt," even then if there was no authority for the original act that promise of itself would be null and void; for it would be without any consideration whatever: that is a strong position to lay down to you. I will therefore unburden your minds of doubt by citing Fenn and another *v.* Harrison and others, 3rd Term, reports, p. 757, "Where the holder of a bill of exchange desired A. to get it discounted, but positively refused to endorse it, and A. delivered it to B. for the same purpose, informing him to whom it belonged; and B. finding that he could not dispose of it without endorsing it, was prevailed upon to do so by A.'s telling him that he would indemnify him; but the endorsee took it upon the credit of the names on the bill without any knowledge of the real owner; although such original holder afterwards promised to pay the bill, yet such promise cannot support an action brought against him by the endorsee, it being *nudum pactum*; so, as A. was a special agent under a limited authority, he could not bind his principal by any act beyond the scope of such limited authority, so that the actual promise to pay by the one individual who has here profited by the transaction, the agent having no manner of authority, and his promise being *nudum pactum*, was no ratification. Can it be said that any one of the things in these reports that have been poured upon you is anything like that—that there is in them anything amounting to this case, anything that comes near it. The plaintiffs fail in their very first step, because they never are able from the very nature of things to make the proprietors speak at once. The only time they speak at once is in that deed, and that fails in the way I have pointed out. You will bear in mind also, that the reports which represent this liability of the proprietors are false; and, therefore, even if a ratification were shown it would fail to the ground, having been made on false representations Those reports, I have no hesitation in saying, that represent these as liabilities on the whole body of proprietors, are false. Those who drew them up did so under a mistake, by which we are not bound. There is, however, another point to be observed upon with respect to the ratification My learned friends have put in a resolution passed at a meeting called in pursuance of the wish of Mr. Hart, on the 16th of March, by which they appointed a committee to wind up the concerns of the company. I do not know what the Court will hereafter say to that act. I will acknowledge that the authorities are not so plain upon that point as upon the others I have submitted to you. It is a point, however, that I shall take, and leave for the consideration of His Honor to direct you on. I say, therefore, with respect to that part of the case, that the act done amounted to a dissolution of the company at that time; and then I say, if there was a dissolution of the company at that time, there was clearly an end of any authority whatever. A meeting of proprietors afterwards could have no authority to do anything but wind up the affairs and pay off the debts of the company. What their authority was is shown in the case I have cited to you. It is expressly shown that after the dissolution of a partnership there is no power of incurring fresh liabilities, and therefore all acts of ratification, even if there was only one of the proprietors away, and all the rest were unanimous, would be without power to bind the absent one. The company, then, being dissolved, there is an end of all question of ratification. With regard to this matter, of the mode in which an authority must be pursued; although I might rely sufficiently upon the struggle of my learned friend to support this part of his case, I will call your attention to some other authorities, in order to show you that, no matter how numerous a meeting of proprietors might be—

THE SOLICITOR-GENERAL: My learned friend has stated that after the 16th of March, there was a dissolution of the company. It was quite otherwise; the meeting merely appointed a committee to report upon the subject. The meeting was adjourned till the 16th of September, and it was then determined to dissolve.

MR. WINDEYER: I stated that I was not aware what construction the Court might put upon this act; that I would not state positively what the law was, but that I might have the benefit of the point before the Court, I left it to His Honor's direction. But I may observe this, gentlemen, that when my learned friend is driven to such a state of desperation as to interrupt me upon a point of this kind, you may rely upon my having given him no opening so to do in weightier points, but have been careful in stating the law and the facts. The wording of the resolution my friend refers to, is something to this effect: it does not dissolve the company, in so many words; but, with a view to the winding up the affairs of the company, the committee are appointed to do so and so. Now it is a doubtful point whether the appointment of that committee, in the terms used, may not, in constructions of law, operate as a dissolution of the partnership. It is doubtful, because it is not expressed, that the company is hereby dissolved. There are no express words resolving on actual dissolution, and I should have thought such an act required express words; but I have found an authority in which the appointment of persons to wind up the affairs of a company has been construed to amount to a dissolution of partnership. What may be the ultimate effect of that upon the Court I cannot say; therefore, I did not state that there had been a dissolution of the partnership, but that for the purpose of this part of the argument I would assume it, leaving it to His Honor to decide. However, in my learned friend's position I can forgive him a great deal; I can quite conceive that it is not a very pleasant one. The meeting you understand was expressly summoned for the purpose of dissolving the company.

MR JUSTICE DICKINSON: What meeting?

MR. WINDEYER: That held on the 16th of March, your Honor. So that all together it is a very doubtful thing whether as between the parties themselves there was not an act of dissolution at that time. I am not driven to contend for that, because I am quite willing to rely upon the impossibility of ratification. But whether there was a majority, or even unanimity at this general meeting, whether they did do all that my learned friend contends they did, it is still a question whether they did it properly, whether they pursued this authority. You will bear in mind that the natural law is that every partner has an equal right to manage the concerns of the company,—that may be modified by agreement, as it is so here, where more votes are given to one than to another. At these meetings of proprietors, everything was to be done by ballot. The effect of taking the votes by ballot was to give operation to the other clause of the deed by which parties might vote by proxy, and by which parties could vote according to the number of shares they held. Therefore, the operation of these clauses was to give those who had a deep stake in the company a greater share of influence, and also perhaps to take it away from those, who without being very large proprietors, might have got into an influential [illegible]

be taken by ballot. Now, it is in evidence that all the votes were taken by show of hands. What is the effect of that but to do away with all the rules have provided for? Thus a person who has only got one vote may put up his hand, and have equal influence with one who has eight votes. It is no answer to this to say there was a previous resolution that the votes should be taken by show of hands. That motion itself should have been put to the ballot, and if it were not then the object of the ballot was done away with altogether. For what is the motive of the ballot, but that those who, from nervousness or any other cause, might be intimidated from voting as they wished if questions were carried by a show of hands, might be sheltered from observation. Therefore, the preliminary vote ought to have been by ballot. And the terms of the deed are to that effect, for the deed expressly says—"That at every general meeting of the said company, the decision of every question or proposition, matter, or thing, shall be by ballot." Besides this, you are aware that there were absent from this meeting 140 of the proprietors, and it is not proved that there were any proxies present. It is on behalf of these parties we appear to-day, not on behalf of Mr. Norton and others who may have made themselves liable. But the plaintiffs have brought the action against the whole Company, and to show you how little power there is in a majority where a question of authority is concerned, I will again cite the writer I have before had occasion to refer to, M. Pardessus, on the Law of Commerce, 4th vol., p. 31:—"But the deliberations of the majority are of no force, except in that which concerns the management, and cannot change the primitive and constituent conditions of the co-partnership, unless the deed itself so authorises them. This deed is the assemblage of the conditions without which the association would not have taken place, and which must be executed however numerous may be those who wish to depart from them. The unanimity of the partners can alone modify the deed which is itself the unanimous work of those who originally signed it. He, or they, who constitute the minority, are entitled to say that it was only upon the faith of the invariable execution of the conditions relative to the mode of deliberation that they became partners." That general proposition of law has been supported in our own Courts. In Moore v. Hammond, 6 Barnewall and Cresswell, p. 462, Lord Chief Justice Tenterden says, "It is of great importance to a partnership, consisting as this does of a large number of persons who place the management and control of their affairs in a small number, and by the deed by which they so place their affairs under the management of that small number, provide certain regulations for the conduct of that small number by whatever name they may be designated, that the regulations regarding the meetings of those intrusted with the management of their affairs, should be held in pursuance of the directions of the deed. The deed in question provides for two classes of meetings of the directors, the one to be held without summons or notice, the other to be held upon summons. The class that may be held without summons or notice are weekly meetings, and they are to be held at such day and hour as the directors shall from time to time agree upon. Supposing therefore, the directors at any meeting to have come to a resolution that there should be a meeting held on any one specified day in the week, a meeting on that day without notice or summons would be a good meeting within the provisions of this deed; but unless the directors have previously agreed upon the day on which the meeting shall be held, it appears to me that a meeting on any other day is not a good weekly meeting within the meaning of this clause. If it were held to be so, it would be in the power of any three directors, the chairman or deputy chairman being one, to hold a meeting to make an order for payment on shares, or to do any other act whatsoever regarding the affairs of the company without any notice to the proprietors. I cannot think that such was the meaning of this clause, but that a meeting cannot be legally held unless by notice, or unless the directors have previously agreed to meet at a certain time and place, in order that every director might know the day on which such business will be transacted, and that he may have an opportunity of attending. I am therefore of opinion that this objection must prevail. It is said that a great length of time must elapse if a fresh summons according to the deed were required. But five or six days certainly would be sufficient. Upon the whole I think the meeting was not duly convened." I have next a case that approaches something nearer to the present, inasmuch as it was decided in spite of my learned friend's "broad grounds." It is Davies v. Hawkins, 3rd Maule and Selwyn, page 489: "Where a number of persons made subscriptions, and formed themselves into a company for brewing ale, &c., and entered into a deed by which it was agreed that a committee to be appointed should have power to make rules, orders, and bye-laws, subject to confirmation by a majority of the proprietors at a general meeting, that the conduct of the business of the brewery should be confided to two persons who should be styled brewers, and the trade should be carried on in their names, &c, that the directors for the time being should have power to direct and regulate the general affairs and business of the company; that a general meeting of the members of the company should be holden every quarter. The defendant was an original subscriber, and still holds shares, and was for some time a director, and executed the deed. At first two persons were appointed the brewers, but they having withdrawn, the Directors recommended to the general quarterly meeting, to appoint only one, and that the plaintiff should be appointed. The subscribers accordingly appointed the plaintiff the brewer, and he has continued such ever since. The plaintiff in that capacity delivered to the defendant at different times several quantities of ale brewed for the company; no bills of parcels were delivered, but the deliveries as they were made were entered in a book kept by the defendant, upon which was inscribed British Ale Brewery. The defendant paid money from time to time at the compting-house of the brewery, and to the collecting clerks when they called, taking printed receipts entitled 'British Ale Brewery,' and signed by the clerks who received the money. In some instances the receipts were expressed to be for Davies and Co. The plaintiff's name alone was entered in the books of the Excise, and he was personally answerable for the duties, and all contracts for malt, hops, &c., were made by him in his own name. The plaintiff's name, with the words "and Co.," were upon the drays, harness, &c., and the draymen received their orders entirely from him. The action is brought with the consent of the committee." Lord Ellenborough, in giving judgment, says, "Here a change has been made in the constitution of this company, which could not be made without the consent of the whole body of subscribers. It was such a substantial alteration in its constitution as required the assent of all." And the other judges concurred; showing that those parties who are dealing with agents are bound to look, in every particular, for the authority on which they are to depend; and if they depend upon the ratification of a meeting of proprietors, they must look to the deed, to see that they have the power to do what they rely upon. There is a similar authority in the case of Smith v. Goldsworthy, in Gale and Davison; and the same principle is recognised in Natush v. Irving, in the appendix to Gow on Partnership, cited in Gow on Partnership, p. 49, as also in Lyons v. Haynes, 6th Scott, 741. Also, to show in what cases fresh authority must be obtained from the principal, I would refer his Honor to Smith v. Winter, 6th Meeson and Welsby, p. 641. Gentlemen, I am sure you are tired of these books, and I am really, at last, ashamed to trouble you with more of them. I would not have gone so much into them; but the law is so much mixed with the facts, the verdict depends so much upon the principle of law mixed up with these transactions, that it was impossible you should rightly understand our defence and the justice of our case unless I had so done. I shall now come to the last point that I opened to you yesterday, which is, that if my learned friends cannot get this money from all the proprietors, they may, if no technical objection intervene, do so from the parties to this contract even a law, and if not at law, certainly in equity. First of all, as to the parties being sued at law, the facts appear to be these: that here are certain directors who do certainly undertake to do a certain thing, and upon that they prevail upon Mr. Hart to do certain other things. On every principle of justice if Mr. Hart be not in the wrong himself he is entitled to recover from them. He cannot recover from us because this is not our note, it is not our loan, but the note and the loan of those who entered into the contract. Now it is clear, even if the directors have entered this business in violation of the deed, the person with whom they dealt may recover from them, and you are not to consider whether it would be hard upon Mr. Norton or those who have made

act. You are not to decide now upon this question, whether it would be a hardship upon the directors, but to confine yourselves to the present case. "Sufficient for the day is the evil thereof," and sufficient for the case the circumstances thereof. That the party who has made this contract can be bound by it will appear from a number of cases I will now mention to you. Tredwen v. Bourne, 6 Meeson and Welsby, p. 461. This action was brought against the defendant as a shareholder in the "Trewalfas Tin and Copper Mining Company," to recover the price of coals, timber, candles, &c., furnished in 1838 and 1839, to the Trewalfas Mine in Cornwall, belonging to the company. It appeared from the evidence of the clerk of the company, that it was formed in the year 1837, the prospectus stating that the capital was to be £30,000, in 3000 shares of £10 each. The defendant, who resided in Liverpool, took 100 shares, in all 2000 only were disposed of. There were directors, a secretary, and other officers, and an office in London, at which the business of the company was transacted. The mines belonging to the company were worked, and mineral raised and sold, but no profits were made by the concern. The goods in question were supplied on the order of the directors, and were necessary for the ordinary use of the mine. There was no evidence that the defendant had ever been at the mine, or had attended any meetings of the company; but two letters signed by him and several other shareholders, of the dates of November, 1837, and February, 1838, being requisitions to the directors for a meeting to remove one of their body, were put in. It was objected for the defendant that there was no evidence to charge him in this action; that there was nothing to show that the directors, who actually made the contract with the plaintiff, had any authority, expressed or implied, from the defendant to do so." The jury found a verdict for the plaintiff. Then there is a motion for a new trial, on the ground that the original contract by which the parties were bound was altered. The argument for the defence was, that the shareholders were only bound by the prospectus, it was that by which they were brought together; and if it had been an action against the whole of the company, the defence must have prevailed, but here the defence failed. "Because the question is," says Lord Abinger, "whether the defendant's letters did not furnish evidence to go to the jury, that he was cognizant of its being carried on with a smaller amount of capital than was originally intended, and I cannot say that they did not." It being shown from his letter that he was cognizant of the fact that the deed of copartnership was violated, if he had entered into the contract with the innocent party who had furnished the coals &c., he was bound to pay him, and he was made to pay him. So the well-known case of Pitchford v. Davis, 5th Meeson and Wellsby p. 4, turned entirely upon that, "The question is," said Lord Abinger, "whether the directors were the agents of the defendant in carrying on the business with so small a capital I thought at the trial, and am still of the same opinion, that where a prospectus is issued, and shares collected for a speculation to be carried on, by means of a certain capital to be raised in a certain number of shares, a subscriber is not liable in the first instance, unless the terms of the prospectus in that respect are fulfilled. But if it be shown that he knows that the directors are carrying on the undertaking with a less capital, and has acquiesced in their so doing, he may become answerable for their future contracts." In this case there was very little evidence to show that, and I am satisfied with the finding of the jury, it does not matter which way the case went; but I believe there the man lost his case; because there the jury did not find that the party had acquiesced. Baron Park says, "I think the case was very properly left to the jury." The defendant by taking shares in this speculation gives authority to the directors to bind him by their contracts in the event of the proposed number of shares being disposed of, and the proposed capital obtained. The secretary who gives the order to the tradesman is the party primarily liable, the directors also who give the order to the secretary may be liable. A third party may become liable if it can be shown that he has authorised the act of the directors in making the contract." Now, who is the party sought to be made liable? The party here is the collective body of shareholders; but there is no evidence that the collective body of shareholders acquiesced in the transaction. In point of fact, it is impossible that there could be a ratification, unless it could be made out by the deed; and, therefore, unless my friend can show that the deed has been strictly followed, he can make out no claim against us; although he may against those who were parties to the transaction. If it should be said that it would be too much trouble to sue the directors separately—if it should be said that there are other circumstances that might prevent the present plaintiff recovering against Mr. Norton and the other directors at law, I do not say there are not. I do not say that in law there might not be, in consequence of the peculiar conduct of Mr. Hart, difficulty in recovering against any of the directors; but in equity it is decided that if a person make a contract representing himself as the agent of another, and as being fully authorised to make it, and if the fact be that he is not authorised to make it, he shall be bound himself as if he had made it on his own account. Therefore, all those who represented themselves as our agents might be liable to even to the extent of all their private property. There is a possibility that Mr. Hart might by his conduct have barred himself as against them; but this I will say, that if the substance of the transaction was, that we were to take the security mentioned in the formal condition, that we got the money upon that understanding, and gave it to those from whom we received the security, then we are trustees to the full amount of the security on behalf of those who advanced the money. Nor do we wish, as alleged by the Solicitor-General, to keep both the security and the money. The money we have disposed of to Messrs. Hughes and Hosking, though we may have derived an advantage from their not crashing immediately. The security, it may be as my learned friend says, we still hold; but it is not ours in equity, we cannot retain it. It may be that the security is not worth what it was, but little or much it is not ours. However, even in those times I dare say the security is not far less than the amount of plaintiff's claim, but this I think I may say without danger, that if this colony is to continue as a colony at all, the time will come, and soon, when the tide of its prosperity must rise so as to float these securities again; and although they may not rise to their former fictitious value, they will rise enough to reimburse Mr. Hart all he is entitled to. If he has to wait for a few years, that is the risk he ran when he entered into this contract, and it is a risk he must abide by. He is not on that account to put you in possession of doing the monstrous injustice he asks at your hands. That equitable remedy is still open to him, we do not deny it to him: the great bulk of proprietors who contend through me that they have nothing to do with this contract who maintain that their agents exceeded their authority, also say to the Bank of Australasia here is the property acquired by your money, take it, you may do what you like with it." No blame is to be cast upon them because they do not choose to adopt an act which they never originally contemplated; although it may happen that the directors and some few proprietors might have been willing to go on and endeavour to realise these assets for the Bank of Australasia. Because matters have now turned out adversely, Mr. Hart has no right to come against us, he can only look to the rights he had when he made that contract—what those rights were I need not repeat. I imagine that the device of a peroration was invented for the purpose of meeting the consequences of the inattention of an audience. I do not, however, think it necessary for that purpose on the present occasion, as undoubtedly I have to thank you for an amount of attention unexampled in any Jury, to an address so lengthened. Suffice it to say, that we take refuge in the fortress of the law, of which you are the guardians, and call upon you to protect us. If you do not, there is no safety in this or any other community for those who have appointed agents with limited powers. We depend upon the law—we did so when we signed the deed, and that deed is not now to have a meaning put upon it which we never intended—which we never dreamed of—a meaning which it would be monstrous to give to it. What you will have to do will be, simply to consider whether we did or not make this note? Did or did not the whole of the proprietors, who are now tried by this deed, authorise their agents to borrow the money in question? We have now together, in united thought, traced the rising and the spreading of that cloud, which, no bigger than a man's hand, when the directors first made default, now dark and lowering hangs over the land like a pall. The fearful consequences that may follow its bursting I am not at liberty to dwell upon, for whatever those consequences may be, it is by the evidence you must be guided in your verdict, even if it lead

in which I may address my countrymen, shall they hear a sentiment inconsistent with those principles of truth and justice which ought alone to govern us, and which in this Court must at all sacrifices be upheld. I know too well the responsibility, the awful responsibility of uttering the winged words, which once issued from the lips, no power can recal. They go forth to be absorbed by the minds of our fellow-men for good or for evil, and what they may there work is upon the head of him who sped them forth. Always thus guarded last of all, even as an advocate, could I forget the duty I have laid down for myself in addressing a tribunal, whose very name of Jury must remind us of the sacred sanction under which you sit in judgment. But it is by that sacred sanction that I entreat you, that I implore you, to look to the evidence, to look to the mode in which it is to be interpreted, and, regardless of what you may feel, from being directly or indirectly interested in these or other Banks, to say whether it shows any authority in the agents of the defendants to contract this loan, to make this note; or whether it satisfies you that this monstrous transaction is a part of the ordinary and usual business of banking. If it do not, then may you with safe consciences rejoice that the lot has not fallen upon you to draw down from that dark cloud those lightnings which must utterly blast the already fallen fortunes of the victims of grasping avarice and sordid treachery, whom I represent, and whose cause I now leave to your guardianship.

TUESDAY.—TENTH DAY.

The names of the Jury having been called over, His HONOR proceeded to sum up the case as follows:—

Gentlemen of the Jury, in the action you have been so long and patiently considering, and for your attention to which the parties and the country are so much obliged to you, the Bank of Australasia is the plaintiff, and Thomas Chaplin Breillat, on behalf of the Bank of Australia, is the defendant. The 1st count is on a promissory note made by one Potts, in favour of the Bank of Australia or order, for £3480 12s., by the bank endorsed to the plaintiff, dishonoured by Potts on presentation when due, of which the Bank of Australia had notice. Upon this note the three first issues have arisen, which are now submitted to your adjudication.

The first issue is whether or not the Bank of Australia endorsed that note to the plaintiffs.

As to this, Mr. Macarthur deposed that he was Chairman of the Bank of Australia, and signed the note for the bank. Upon inspection of the note it does not appear that the bank is liable upon it, for the endorsement does not specify that the signature H. H. Macarthur is for the bank—nor that Macarthur has signed as Chairman. The endorsement is H. H. Macarthur, Chairman of the Bank of Australia, and the designation no more binds that bank than if he had subjoined to his name, Esq., Knight, or any other term of description. I am of opinion, for that and other reasons which there is no necessity for me now to mention, that you should find as your verdict on the 1st issue that the Bank of Australia did not endorse the note mentioned in the 1st count of the declaration.

The 2nd issue is, whether or not that note was duly presented to Potts for payment.

As to this, you were furnished with the examination of Ashton Boyes Ottley.

He said he presented the note for payment on the 10th July, 1843, at the Bank of New South Wales, and payment was refused. If you believe his evidence, your verdict on the 2nd issue should be, that the note mentioned in the 1st count was duly presented for payment.

The third issue is, whether or not the Bank of Australia had due notice of the dishonour by Potts of his promissory note.

As to that the evidence of the same Ottley is, that Evans, then clerk in the Bank of Australasia, wrote a notice of dishonour in a book, made a true copy of it, and directed it to H. H. Macarthur, Esq., Chairman of Board of Directors, Bank of Australia—enclosed it in a half sheet of paper, addressed it to Mr. Walker, the Cashier, and put it in the Post Office. This witness does not state the day on which he posted the letter which contained the notice. We cannot, therefore, distinctly see that notice of dishonour was given at the proper time, and therefore I think your verdict on the 3rd issue should be, that the plaintiffs did not give due notice to the Bank of Australia of the dishonour by Potts of his promissory note.

The second count of the declaration is on a promissory note made by Dawson, in favour of E. Manning or order, for £2854 0s. 10d., one month after date—by Manning endorsed to the Bank of Australia who endorsed it to plaintiffs, who, when it was due, presented it to Dawson for payment; and, on his default, gave due notice to the Bank of Australia. Upon this note have arisen the 4th, 5th, and 6th issues. The 4th issue is, whether or not the Bank of Australia endorsed the note to the plaintiffs.

Mr. Macarthur stated the same evidence with respect to this as to the other note. His mode of endorsement is the same in one case as the other. I am of opinion that your verdict on the 4th issue should be, that the Bank of Australia did not endorse the note mentioned in the 2nd count of the declaration.

The 5th issue is, whether or not this note was duly presented for payment to Dawson.

As to this, George Faircloth stated upon looking at the note, that he was a clerk in the Bank of Australasia—that the Bank held it when due—that it was payable there—that Dawson banked there—that on the day when it became due he examined his account to see if there were assets to pay it, and there were none; that witness moreover stated, he was acquainted with Dawson's handwriting. If you believe the evidence of this gentleman, your verdict on the 5th issue will be, that the note mentioned in the 2nd count of the declaration was duly presented to Dawson for payment.

The 6th issue is, whether or not the Bank of Australia had due notice of the dishonour, by Dawson, of his note.

As to this, Francis Grey Smith stated, upon looking at the note—that when it became due he was a clerk in the Sydney branch of the Bank of Australasia—that at the time one Evans was a clerk at the same place, but is now at Hobart Town. Upon looking at the notice book of the Bank, and perusing a draft notice, which is before us, he said—Evans made one like it—that he enclosed the notice in an envelope, addressed to Mr. Walker, Bank of Australia—that he put the letter in the Post Office on the day when it was due, before six o'clock in the evening—that Mr. Walker was then Cashier of the Bank of Australia, the only Bank of Australia in the colony—that the 17th June, 1843, was on a Saturday. If you believe the evidence of this witness, the presumption is, that the notice (which is good) came to the hands of the Chairman, to whom it is addressed. If you think so, your verdict on the 6th issue should be, that the Bank of Australia had due notice of the dishonour of the note mentioned in the 2nd count.

The 3rd count of the declaration is on a promissory note for £154,000 made on the 20th October, 1843, by the Bank of Australia, payable to the Bank of Australasia on demand. Out of this count one issue, (viz.—the 7th) only has arisen, and that is, whether or not the Bank of Australia made such note.

The 4th count of the declaration states that the Bank of Australia was indebted to the Bank of Australasia for money lent. Upon this count has arisen the 8th issue, viz.—whether or not money was lent by the one Bank to the other, as in that count alleged.

The 7th and 8th issues, it will be found in the sequel, are connected together, and fall within the same consideration. To those issues I now invite your attention.

It appears by the evidence, that the Bank of Australia, as now constituted, was formed by a deed of settlement in the year 1833. By that deed it was provided that chairmen, directors, and the usual administrative officers of a company should be appointed, that meetings should be convened in specified ways, and the order of proceeding at those meetings was set forth in that document.

Minutes of the proceeding which have taken place at the meetings of various members of the company have been produced in evidence, and if you believe the evidence of Mr. Macarthur, you have grounds for relying in the accuracy of these minutes. Upon referring to the minutes, you will find in many instances an entry to this effect, viz.—"It having been determined that all matters before the meeting shall be decided by a show of hands, it was moved, 1st, 2ndly, and so on." By the evidence of Mr. Larnach, it appears that, according to his belief, at all the meetings which he attended, with one exception, the questions were decided by show of hands, in consequence of a previous resolution to that effect, also carried by show of hands.

Upon this the learned counsel for the defendant contended, that all the regular resolutions of such meetings were invalid, as according to the 70th section of the deed it is provided, "that at every general meeting of the company the decision of any question shall be by ballot, be then previously determined by a majority of the members who shall then be present, "and therefore that at each meeting the dispensation of the ballot should be determined by ballot. I do not accede to that argument, for as the framers of the clause evidently had the subject of ballot under their consideration had they intended the dispensation to have been by ballot, they would naturally have worded the clause thus, "unless some other mode of decision shall be then previously determined, and resolved upon by ballot of the members who shall be then present."

I think, therefore, that there is sufficient evidence, if you believe the plaintiff's witnesses; 1st. That all the meetings were regularly convened; 2ndly That at all those meetings the proceedings were properly conducted; 3rdly. That the different gentlemen, who by the evidence appear to have acted as officers of the Bank of Australia were properly appointed; and 4thly. That the minutes are faithful records of the proceedings.

Upon all these points of fact you are, however, to judge for yourselves, and you are bound to examine them strictly, so that your verdict as to the facts may be founded, not on that of mine, but upon your own opinion. As to the law by which the effect of the witnesses' statements is to be regulated, you may doubtless take upon yourselves the determination of that matter; but you will act not unconstitutionally in taking it implicitly from myself. Should I in that matter be mistaken, my error may be much more easily rectified, than if the same were committed by yourselves. I have said that there is evidence of the correctness of the minutes. Some evidence, however, has been given, which may not impossibly impeach in your estimation a resolution which the minute of the 10th May, 1843, marked F., reports was unanimously carried. It is the 2nd resolution, viz:—"That Mr. Macarthur shall sign for the Bank its negotiable paper, and that such signature shall bind the proprietors." It was stated by Mr. Walker, that Mr. Gilchrist, who moved the resolution, said that it was for the Union Bank.

If the resolution was carried for the purpose of the Union Bank alone, then it was not what it appears by the minute book to have been. But when you have carefully read over—1st. The report submitted to that meeting, (which was by the first resolution adopted and received), in which it was stated that the Bank of Australasia had consented to lend £150,000, as formerly mentioned; 2ndly The minute marked G, of 16th March, 1843, by which it appears that in a report then submitted, the directors expressed a hope that the arrangement made with the Bank of Australasia would be satisfactory to the proprietors, you may not unreasonable conclude Mr. Walker was mistaken, especially when you see that the resolution was moved by Mr. Gilchrist, and seconded by Dr. Wallace—the same Dr. Wallace afterwards proposing a restriction on the resolution, which proposition was unanimously rejected. It will be for you to consider whether the power apparently confined to the resolution moved by Mr. Gilchrist, and seconded by Dr. Wallace, on the 10th May, 1843, was saddled with any restriction about the Union Bank.

A circumstance in the plaintiff's case occurs to me at present, which may be considered hereafter. I lay no stress on it at present. It is this: If the second resolution passed at the meeting of the 10th May, 1843, be correctly reported on the minutes, it appears that the proprietors had determined that Mr. Macarthur should sign his name to such securities as by the board of directors should be required; whereas by the 55th clause of the deed of settlement, the board of directors are to settle in whose name shall be signed those securities required by the proprietary. The deed says, that the board of directors shall determine on behalf of the proprietors; the resolution announces that the proprietors had determined on behalf of the board of directors.

Let me now direct your attention to what appears to be the main facts upon the 7th and 8th issues, if you should believe the witnesses whom you have had before you.

Messrs. Macarthur, Norton, Edye Manning, and Mackenzie, being respectively at that time the Chairman, Directors, and Cashier of the Bank of Australia, visited, at the Bank of Australasia, Mr. Hart, the superintendent of that concern, in January, 1843. They stated themselves to be a deputation from their Bank. It was stated that the object of their visit was to obtain for their company pecuniary assistance, to enable them to meet immediate engagements—their assets, though valuable, not being at that period available. They were requested by Mr. Hart to state their position; and on its being stated that they owed £113,000 for their notes and deposits, Mr. Hart remarked, that all their liabilities, viz., their bills payable, had not been included, as some of them were then in the possession of the Bank of Australasia. It was then stated that almost all those bills were on account of Hughes and Hosking, for whom they hoped a separate arrangement might be made with the Bank of Australasia. Mr Norton, moreover, stated that the property of Hughes and Hosking was worth above £500,000, and that ample security would be afforded to any Bank that would take up their affairs. Mr. Hart replied, that his Bank would not adopt their concerns, and that the gentlemen who formed the deputation should look their difficulties in the face, and disclose to him unreservedly their position. It was agreed that a statement should be prepared, and the meeting terminated.

On the 21st February, 1843, Macarthur, Norton, and Manning, again came to Mr Hart, and the statement R. R. (the pencil marks thereon being in Norton's writing) was produced. Mr. Norton read out from that statement the matters there written, and said unless his Bank obtained immediate assistance, it must stop. Mr. Norton and his companions recognised the items called in the statement "Acceptances," as being bills which the Bank of Australia had accepted for Hughes and Hosking, and for John Terry Hughes; the items "Bills," as guarantees given by their Bank for Hughes and Hosking, and for John Terry Hughes, and upon which the Company was liable.

After inspecting this statement, Mr. Hart remarked that their liabilities exceeded £250,000, and that his Bank was not disposed to go so far. That he would lend £150,000 if they could get any one to lend money, so as to make the whole advance £200,000. It was agreed that the Union Bank should be applied to, and Mr. Hart undertook to write to its manager, Mr. Maclaren, upon the subject. The result was, that Maclaren engaged to advance £60,000 upon a re-discount of their paper, and Mr. Hart to lend £150,000 on their promissory notes, bearing ten per cent. interest, upon the understanding that the Bank of Australia should carry on the affairs of Hughes and Hosking, of John Terry Hughes, and of John Hosking, by incorporating them with their own. That the Bank of Australia was to incorporate and manage those affairs as a trust confided to it, not for its own benefit only, but for the creditors of that firm and these parties generally.

By minute (6) of 22nd February, 1843, the Directors of the Bank of Australia agreed to accept the loan, from Mr. Hart, of £150,000, and pledged themselves to call a meeting of the proprietors for the 16th March then next.

A letter T. T. is written by Mr. Mackenzie, to Mr. Hart, on the 27th February, 1843, stating that in reference to the communications which had taken place between the Cashier and Directors of the Bank of Australia, with Mr. Hart, he was directed by the board to communicate their resolution for calling a meeting of proprietors, for the purpose of making arrangements to change the business and nature of the Bank, and to enable it in the mean time to liquidate its engagements, and expressing their willingness to borrow £150,000 from the Bank of Australasia, at ten per cent. interest, upon the following conditions, viz., that the Bank should cease to be one of issue on or before the 31st of March, 1843. That in winding up its affairs, payments should be made through the Bank of Australasia—that it should cease to discount after that day—that no transfer should be made of shares or stock, without the Bank of Australasia's consent—that the liabilities incurred by the Bank of Australia, for Hughes and Hosking, and for J. T. Hughes, should be covered by them with such trusts to the Bank of Australia as might be necessary to place the control of the affairs of the firm, and of Mr. J. T. Hughes, under the 1st mentioned Bank, to meet their then existing obligations, and to prevent them from contracting new ones without the consent of that Bank; and that the whole of their future business, during the continuance of the trusts, should be transacted through the Bank of Australasia—that the Bank of Australia should not incur new liabilities without the consent of the Bank of Australasia.

In reply to this letter, Mr. Hart, on the 2nd March, 1843, replied (see letter marked Z., No. 1) that the Bank of Australasia would lend the money on the conditions specified in Mackenzie's letter, T. T.

After this, it is clear to my mind that the Bank of Australasia advanced the money at various times upon the cheques of the other Bank, signed by their Cashier, and for that

was ultimately given by Mr. Norton. The money was received and the note was given by authority of the directors, and the acquiescence of some of the proprietors. There is no evidence to connect in point of actual knowledge the whole of the proprietors in these transactions.

I again remark, that it is for you to determine how the facts of this case really were, and you are to regard my observations no further than you shall find them to be based upon facts which you will hereafter ascertain for yourselves. I have stated to you so many of what I conceive to be the facts as are necessary to introduce my own opinion on the legal points connected with the case. The whole evidence is before you. You will carefully consider that evidence, exercising in that consideration a jealous scrutiny of any impression upon the facts to which you will find I have adverted.

The note for £154,000 was signed by Mr. Norton, who is proved to have been not only a partner, but chairman of the concern. He signed it on behalf of the company, as appears by inspection of the document, and it was given and received as security for the money lent.

Whether the Bank of Australia is liable in this action upon that note, and by reason of this loan respectively, are questions determinable upon the same principle, viz.: the authority in some to bind all the members of the company by borrowing under the circumstances detailed in evidence. Upon the solution of this question should depend your verdict, on the 7th issue, whether or not the company made the note, and on the 8th issue whether or not the plaintiff lent to the Bank the same amount by that security.

The actors in the transactions which have so much engaged your attention, are partners in defendant's Association. Let us see what is the power of one member of an ordinary partnership to bind his firm, the reason of that ability, and then we will consider how far the reason and the conclusion are applicable to the circumstances of a joint stock company. In ordinary partnerships, the absence, illness, or remote residence of a member might, were his express consent material, invalidate a negotiation of the utmost consequence to his firm. It is essential, therefore to the safe conduct of partnership affairs, that every member should be able to bind his associates, and therefore the law in allowing the formation of a partnership, imparts that to it which is necessary to its existence, viz; the liability of all upon contracts made by a single member respecting the business of the partnership. The liability which the law is known to imply is therefore virtually held out in fact by those who form a partnership. It is an incident in which strangers naturally believe, in which they are entitled to confide. It is so usual in, so natural to, a partnership, that it is unreasonable to conjecture that the partners have between themselves any contravening stipulation—as to which, at all events, the law absolves the public from enquiring.

If, however, in derogation of this power in a member, to bind the rest, there be a partnership agreement, a stranger with notice of its existence is considered to deal according to the express authority of the compact, and not upon the faculty which the law would otherwise imply.

As the power of one member to bind a partnership, is founded upon the exigency of the case, as being essential to the existence of the firm, and necessary for the purpose of carrying on the particular concern, it is evident that no extraordinary emergencies are within the purview of the rule, which is applicable only to the usual business of a partnership.

Hence you may take it as a rule of law that, in the absence of information to the contrary, parties may deal with a firm upon the understanding that each member may bind the partnership by acts appropriate to the business in its ordinary usages. If it is an ordinary usage to borrow money, one partner may borrow for the rest, and may give the negotiable paper of his firm, if that proceeding is necessary and usual in their trading.

The nature of a joint-stock company has become a matter of judicial knowledge. Chief Justice Tindal, in one of the cases cited before you, observed that "a joint stock company is well known in all the Courts of Law and Equity in Westminster Hall."

A joint stock company differs materially from a common partnership. It is notoriously regulated by Act of Parliament, a charter, or deed of settlement. The partnership does not come fully into existence till there is a capital or fund in hand for carrying on its operations. In common partnerships the speedy action of a member is preferable to postponed deliberation with his firm—consultation is so requisite for a company that provision is notoriously made in settlement deeds for meetings—for resolutions—for various specific proceedings. The nature of a common trading partnership suggests the safe dealing with the firm in contracting with a single member the designation joint stock company implies a managing directory, with restricted powers and limited authority.

Ignorance of a stipulation between partners being essential to the rule in ordinary cases of one partner binding his fellows by his contracts, it follows that in the case of joint stock companies, by whose general nature the world has notice of there being specific partnership agreements and appointed agents, strangers who would deal with a shareholder on the credit of his society should particularly enquire into the details of the authority with which he is invested. Upon general principles I am therefore of opinion that the right of one member of a joint stock company to bind himself and the other members, is not a right or power implied by law like that which belongs to one member of an ordinary partnership in trade, but must depend on the power conferred by the instrument under which the company is constituted.

But in this case we do not rest upon general principles. The defendant is sued as Chairman of the Bank of Australia, by virtue of the local Act 4 Wm. IV. We have, therefore, judicial knowledge that the Bank is a Joint Stock Company. Its deed is in evidence. It is dated May 1, 1833, and the presumption is that such was the period of its execution. The loan was made and the note signed by Mr Norton in the year 1843. Prior to these transactions, viz., on January 1, 1841, the local Act, 4 Victoria, No. 13, became the law of this colony. That Act is entitled "An Act to provide for the periodical publication of the liabilities and assets of Banks in New South Wales and its dependencies, and the registration of the names of the proprietors thereof." By the fifth section of that Act it is enacted that a copy of the charter or deed of settlement of every Banking Company shall be recorded in the Supreme Court for the inspection of any person requiring to inspect it: by section 7, that the names of the proprietors should be also registered. Hence when the plaintiffs made the contracts now under consideration they had (if not from the nature of the company represented by the defendant) such actual means of knowledge (amounting in law to knowledge itself,) as fixed them with notice of the contents of the Bank of Australia's deed of settlement. From this instrument the plaintiffs might have ascertained whether they might safely contract as they have done. They seem to have known by means of the Bank of Australia Act, 4 Wm IV., (which I hold had become a public Act before the making of these contracts), that the Bank of Australia was such a Banking Company as is mentioned in the local Act, 4 Victoria, No. 13. They had, therefore, notice that the company was regulated by a deed, which at all events might contain a stipulation contrary to the general partnership liability of the whole being bound by the engagement of a single member—they had notice that the deed was open for their inspection. Upon this second ground, therefore, I am of opinion that the validity of these contracts depends upon the deed in evidence.

To complete this argument we have the evidence of Mr. Falconer, who acted in these transactions by the authority of Mr Hart, the plaintiffs' superintendent. He has stated to you that Mr. Hart managed this matter, and authorised him to lend the moneys. He was present at all meetings which took place upon the business. That they had before had dealings with the Bank, and were aware that it was managed by a chairman and directors, as joint stock companies usually are. That the printed copy of the deed was shown them at their request when the assistance was besought.

Before we proceed to the consideration of the deed before us, I will offer you a few observations upon some of the rules by which deeds are generally construed. Deeds are to be construed according to the intention of the parties. The intention must be adjudged of the several parts of the deed. Intent ought to be picked out of every part, and not out of one only. Thus very plain words have been restrained by the rest of the deed. For instance, where a person by deed demised land for 21 years, and covenanted at the end of 18 years, or before, on request of the lessee, to grant a new lease of the premises for the like term of twenty-one years, at the like yearly rent, with all covenants as in that indenture were contained; it was held that this covenant was satisfied by a tender of a new lease for 21 years, containing all the former covenants except the covenant for further renewal. In another case, where in a deed there was a covenant for quiet enjoyment, during a term, "without the interruption of J. M., his executors, administrators, or assigns, or any of them, or any other person or persons whomsoever having or claiming any estate or right in the premises, and that free and clear, and freely and clearly discharged or otherwise by J. M., his heirs, executors, or administrators, defended kept harmless, and indemnified from all former gifts, grants, &c., made or suffered by J. M., or by their or either of their acts;" preceded by a covenant that the lease was a good lease, notwithstanding any act of J. M., and followed by a covenant for further assurance by J. M., his executors, administrators, and all persons whomsoever claiming, it was held that the covenant for quiet enjoyment extended only against the acts of the covenanters and those claiming under him, and not against the acts of the whole world. In the construction of deeds, not only should all the operative clauses be interpreted one by another, in giving to each one the sense which results from the tenour of the whole deed, but also with the preamble; subject, however, to this difference in the effect of the comparison, viz., each clause, however plain, may be controlled by another, for the covenanter uses each as the expression of his will; the preamble can only interpret a stipulation when its meaning is ambiguous. If, therefore, a clause as interpreted by the preamble is repugnant to the general tenour of the deed, the provision is invalid. We will now consider the Deed of Settlement of the Bank of Australia.

By the preamble, it appears that a Bank had been before established for the purpose of discount and issuing of notes and bills, and lending moneys on securities and cash accounts; for the receiving moneys on deposit accounts; for the safe custody of moneys and securities; for moneys for the general public accommodation and benefit: as also for transacting and negotiating all such other matters and things as are usually done and performed, relating to, or connected with, the ordinary business of banking; and that the parties to the deed had agreed to carry on such business, and for that purpose became parties to the operative clauses of the deed.

The 3rd of these clauses stipulated that there should be a capital of £200,000. The 4th, that such capital should be divided into shares. The 21st, that the shareholders should have votes in proportion to their shares. The 39th and 48th, that the management of the affairs of the Company should be confided to eleven members, of whom four should be a quorum. The 51st, that such board of directors should have full authority to manage the business of the said company to the best of their discretion and judgment, under and subject to such provisions thereinafter contained. The first of those provisions to which I beg your attention is the 55th clause, viz.:—

"That such board of directors shall from time to time settle and determine in whose name or names all securities that shall be required to be entered into by or on behalf of the said company, or by or on behalf of any person or persons transacting or negotiating any matter or business whatsoever therewith shall be taken and given, and by whom and in what manner and form, and for what amount the several cash notes of the said company shall be drawn, signed and given, and issued, and from time to time alter and vary the same as they shall think proper."

By this clause the board has power to direct that certain people shall sign their names to certain securities on the Bank's behalf. It may be said why is this clause inserted unless certain securities are to be given for the company, and who can give such securities but this board who is to regulate its business? You must make the clause speak, and every word must have a meaning assigned to it. Unless the clause is construed so as to allow the directors to borrow money, it is insensible. This argument proves too much, as it establishes this point, viz.: that the directors may pledge the company upon every legal transaction for which their security would be accepted. According to this view not only might the directors borrow money, but they might purchase land, insure ships, engage the Company in all conceivable contracts, however foreign to their business. I do not say that this argument has been specifically advanced, but observations have been made which, as I conceive, may have suggested it to your reflection. I call your attention to it, as the clause does not convey anything very distinctly to my mind but the settlement of signatures, and because in his most able and dexterous address I understood the learned Solicitor-General to say that the Deed of Settlement contained no clause in any way limiting the power of the directors. All that the Board by this 55th clause can do is this, viz., settle in whose names shall be made the securities which the Company shall be required to enter into. What is the meaning then of this word "required?" We find it is a clause which speaks of persons transacting "any matter or business whatsoever"—large words certainly, but in company with other words as "cash notes of the Company," which, with the general tenour of the deed, confines the matter and business to those of the Bank, and the securities required to be entered into on its behalf, to such as may be requisite in the exercise of the trade for which the Deed of Settlement was made.

The next question for consideration is, the nature of that trade, viz., whether it is the ordinary business of banking mentioned in the preamble, or a business particularised by the clauses in the Deed which are subsequent to the fifty-first. The two modes may be identical; but if in conflict, the latter must prevail. Assuming, then, that it is the ordinary business of banking to borrow money on the circumstances disclosed upon this trial, let us see how far that course is affected by the clauses which I last referred to.

In the first place it is to be observed that the word borrow is no where mentioned—no language which indicates such a transaction. But in some other matters there is no silence—on the contrary, express authorities are created for the obvious purposes of the business. By section 52, the Board is empowered to contract for the hire of service, of houses, and furniture. By section 54, the Board has the entire control of lending moneys on security, and of the purchase and sale of bullion, coins, &c. By section 57, the entire management of the law business of the Bank is left to their discretion. Throughout the clauses after the 51st, so much is expressly confided to the Directors, that all others not specified must be considered as excluded from those sections.

To revert to the 55th clause, it may be observed, that the securities there mentioned may be requisite for the management of some of the contracts which the Board are empowered to undertake by virtue of the 52nd and 54th sections.

I can perceive in the deed no contemplation of such a contract as that of borrowing; on the contrary, that document contains several provisions obviating the necessity of such a proceeding.

By the third section, as I have remarked, the Company was to trade on a capital of £200,000, of which a large portion by section 5 was to be paid up on the execution of the deed. By sections 6, 7, 8, 9, if more money was wanted, further calls should be made, and that the shares should be forfeited if the additional demands were not liquidated. By section 10, that the capital might be encreased. If more money was wanted than was at first paid, the deed contains these provisions for its acquisition. But the necessity for borrowing could never have been contemplated, for by the 32nd section it is provided, that 1-5th part of the net proceeds shall be set apart as an accumulating fund, and shall go to increase the capital of the Company. By the 33rd we have a plan for appropriating all this accumulation, above £2000, and by the 34th clause there is a plan for dividing a surplus among the shareholders.

Whether or not, a borrowing of money at all, or under the circumstances detailed by Mr. Hart, is within the ordinary business of Banking, I feel so clear that the Board of Directors under and subject to the provisions contained in the deed, after the 51st clause, had no power to bind the Company by any borrowing of money, that my advice to you is, to disregard any knowledge you may possess as to Banking in its ordinary course. For these and other reasons with which I will not trouble you, my opinion is, that the deed has given to the directors no express authority to borrow the money advanced by the plaintiffs, and therefore that Mr. Norton had no authority expressly conferred on him by the deed, to bind the Company, by signing his name to the promissory note for £154,000. So many authorities moreover, being by the deed expressly confided to the Board of Directors, the law under the circumstances of this case, implies no authority in the Directors to borrow, or in Mr. Norton to give the Bank's paper for the amount. The transactions we have been so much considering are not warranted by the deed of settlement. The loan, and the note then being made without the company's authority, the next question is whether the company has satisfied them. A subsequent ratification is said to be equivalent to a previous command, and I am of opinion that if a principal with knowledge adopts and enjoys the fruit of his servant's unauthorised contract, he is afterwards precluded from denying the authority of his agent. In this case the agents were the directors, the cashier, and chairmen. The principal is the whole number of the proprietors of the Bank of Australia. It is in evidence that that number is about 170. By no minute in evidence does it appear that 100 even of the proprietors were present either in person or by proxy. There is no evidence that the state of affairs was communicated to all the members, so that they could have ordered the money borrowed to be refunded. I am therefore of opinion that the loan and the security have not been satisfied as contended. Should you, on consideration, agree with me in my construction of the law, you will deliver, as your verdict, on the 7th issue, that the Bank of Australia did not make the note mentioned in the 3rd count; and upon the 8th issue, that the Bank of Australasia did not lend to the Bank of Australia the money mentioned in the 4th count of the declaration.

If you should not agree with me in the opinion I have expressed upon the subject matters of the 7th and 8th issues, but should be of opinion that according to the deed these matters should be considered with reference to the ordinary business of banking, your duty will be to satisfy yourselves as to the fact of the loan and its terms; and, 2ndly, whether the note was given by Mr. Norton as a security for such loan; 3rdly, whether the transactions were within the ordinary scope of banking business. What the ordinary business of banking is I know not; the plaintiffs have furnished you with no evidence upon that point. It was not the defendant's duty to furnish such evidence. It has been stated that it is in the nature of business of banking, that such an establishment as the defendant represents should be subject to the casualty that has befallen it. That may be so; but it is for you to judge whether a loan contracted under such misfortune, is made under circumstances of ordinary banking business, or under stress of extraordinary emergency. If, with this view of the law, you should be of opinion that the loan was contracted and the note given in the ordinary course of banking business, you will find for the plaintiff on the 7th and 8th issues for the principal money, and the interest thereon upon the 10th issue; otherwise, you will find for the defendant on the 7th and 8th issues.

In the absence of evidence, during this trial, of the ordinary business of banking, even in this view of the case (which is not mine), I advise you to find for the defendant on the 7th and 8th issues, in the manner I have before mentioned.

The 4th count of the declaration is for money lent, the 5th for money paid, the 6th for interest, and the 7th on an account stated; upon these counts, by reason of the general issue being pleaded to them collectively, the 8th, 9th 10th, and 11th issues arise.

I have delivered to you my opinions that you should on the 8th issue find that the plaintiffs did not lend money to the Bank of Australia, as mentioned in the 4th count of the declaration. I see no evidence to support the 9th issue for the plaintiff. Some of the money advanced by the Bank of Australasia has, I believe, been paid to third persons by direction of the Bank of Australia's officers. But such payments fall within the same observations as the loan, and upon the 9th issue I think your verdict should be that the Bank of Australasia did not pay money for the Bank of Australia as mentioned in the 5th count of the declaration.

The 10th issue, is on the plaintiffs' claim for interest. That can only be regarded as accessary to the principal moneys mentioned in the 1st, 2nd, 3rd, and 4th counts of the declaration. If your verdict should be against the plaintiffs upon the issues arising upon these counts, as I have advised, you will find for the defendant upon the 10th issue.

As to the 11th issue, whether or not there was an account stated, an acknowledgment by the defendant of a specific sum being due is evidence of an account stated, if made with reference to former transactions which may be adduced in evidence to rebut the effect of the acknowledgment. The plaintiffs' note is evidence of an acknowledgement, but the evidence which we have of the transaction upon which it was given, having rendered it valueless, to charge the Bank of Australia, makes the acknowledgment insufficient to uphold the count on the account stated, I advise you, therefore, to find for the defendant on the 11th issue.

Upon the 4th, 5th, 6th, and 7th counts, by reason of payment being pleaded to them collectively, arise the 12th, 13th, 14th, and 15th issues.

Upon these issues the defendant's learned counsel observed that he admitted that the plaintiff had made out his particulars of demand explanatory of the 4th, 5th, 6th, and 7th counts, but said that the Company had paid those demands, and he referred to the debit side of the account. Now an allowance in account is most certainly a payment, and should be pleaded as such; but the account in question, is an account with which I have declared that the Company had no concern. The defendants, therefore, have not made out this plea of payment, and your verdict should be for the plaintiff upon the last mentioned issues.

Upon the last mentioned counts, by reason of the plea of set-off to them, arises the 16th, 17th, 18th, and 19th issues.

By the particulars of payment and set-off, it appears that the subject matters of the two pleas are identical, and therefore you will find also for the plaintiffs on the issues I have just alluded to.

If you adopt my views of this case, although the plaintiff can recover nothing by this action, you should, in finding the issues for them, state such damages as you would have found had they been the only issues on the record. This is necessary to satisfy the form of law; the damages though found cannot be recovered, as upon this record there will be a verdict for the defendant on other issues inconsistent with that I have advised you to deliver for the plaintiffs.

If, gentlemen, you should think fit to adopt the suggestions I have thrown out, you had better deliver your verdict in this form:—For the plaintiffs on the issues joined upon the 2nd, 5th, and 6th pleas; and upon the issues joined upon the replications to the pleas of payment and set-off respectively,—damages, £6334 13s 10d.,—the amount of notes in the 1st and 2nd counts, with 1s. as nominal damages on the other issues. For the defendants on the issues joined upon the 1st, 3rd, 4th, and 7th pleas; and upon the general issue as pleaded to the 4th, 5th, 6th, and 7th counts of the declaration.

You will now be pleased to take the exhibits and consider your verdict upon the issues joined.

Mr. WINDEYER suggested to His Honor the propriety of directing the Jury that it was optional with them whether they would give to the plaintiffs any damages at all upon the counts under which it had been held that the latter were entitled to obtain a verdict.

His HONOR said, that this point had been already decided by the Court in the case of Seggerson and Healy.

Mr. WINDEYER remarked, that the effect of that decision was simply that the Jury might give damages, but not that they were bound to do so.

His HONOR said, that he had already considered this point, and must decline acceding to the application.

The Jury retired at five minutes past eleven, and at four o'clock P.M. the foreman came into Court, and stated to the Judge that they were not likely to agree upon a verdict, being, in point of numbers, equally divided.

His HONOR stated, that after the Jury had sat six hours a verdict of nine would be received if that number were able to agree; but if this could not be done, they would have to sit six hours longer, when if they were still unable to agree, they would be discharged.

At the expiration of the first six hours (five minutes past five) the SHERIFF having visited the Jury, reported that they were still unable to agree. The Foreman of the Jury was then sent for, who repeated the statement already made by the Sheriff.

His HONOR said, that if, in the course of the next six hours, three-fourths of them could agree upon a verdict, he would come and receive it upon a messenger being sent to inform him of their determination.

Two messengers having been sworn in as special constables, to prevent communication with the Jury, the latter were then locked up.

11 o'clock, P.M.

The twelve hours prescribed by the Jury Act having expired, the Judge took his seat on the bench at a few minutes past eleven, and the Jury having been called on, were asked in the usual form whether they had agreed upon a verdict, to which the Foreman replied in the negative.

JUDGE: Have any nine of you agreed?

FOREMAN: No. We are equally divided.

JUDGE: Gentlemen, you are discharged.

The Court was then adjourned.

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